TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. [redacted]95

LOUIS BROWNLOW, CHARLES W. KUTZ, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND JOHN P. HEALY, INSPECTOR OF BUILDINGS OF THE DISTRICT OF COLUMBIA, PLAINTIFFS IN ERROR,

vs.

MOLLIE SCHWARTZ.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 15, 1921.

(28,314)

(28,314)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 359.

LOUIS BROWNLOW, CHARLES W. KUTZ, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND JOHN P. HEALY, INSPECTOR OF BUILDINGS OF THE DISTRICT OF COLUMBIA, PLAINTIFFS IN ERROR,

vs.

MOLLIE SCHWARTZ.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from supreme court of the District of Columbia	1	1
Caption	1	1
Petition for writ of mandamus	1	1
Rule to show cause	7	7
Answer to petition and return to rule	7	7
Demurrer to return	10	10
Amendment to return	10	11
Intervening petition of Mabel H. Simon	11	12
Petition of Kate E. Lloyd and Edward Lloyd to intervene	13	13
Demurrer overruled; rule to show cause discharged; petition dismissed; judgment; appeal noted by petitioner	14	14

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1921.

	Original.	Print.
Memorandum: Bond for costs on appeal approved and filed	14	15
Assignments of error	14	15
Designation of record	15	16
Clerk's certificate	16	16
Minute entries of argument	17	17
Opinion	18	18
Judgment	19	20
Motion for rehearing	20	20
Answer to motion for rehearing	21	22
Order denying rehearing	23	24
Writ of error	24	24
Bond on writ of error	25	25
Citation and service	26	26
Assignment of errors	27	27
Clerk's certificate	32	30

1 Court of Appeals of the District of Columbia.

No. 3450.

MOLLIE SCHWARTZ, Appellant,

vs.

LOUIS BROWNLOW et al.

Supreme Court of the District of Columbia.

At Law. No. 63778.

MOLLIE SCHWARTZ, Petitioner,

vs.

LOUIS BROWNLOW, CHARLES W. KUTZ, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, Respondents.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:

Petition for Writ of Mandamus.

Filed June 9, 1920.

In the Supreme Court of the District of Columbia.

Law. No. 63778.

MOLLIE SCHWARTZ, Petitioner,

vs.

LOUIS BROWNLOW, CHARLES W. KUTZ, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, Respondents.

Your Petitioner respectfully represents to this Honorable Court:
First. That she is a citizen of the United States and a resident of the District of Columbia and files this suit in her own right.

2 Second. The respondents Louis Brownlow and Charles W. Kutz are Commissioners of the District of Columbia, there

being no third member of the Commission, and are sued as such. The respondent John P. Healy is a citizen of the United States and the Inspector of Buildings of the District of Columbia and is sued as such.

Third. That heretofore to wit during the month of April and prior to the 30th of April, 1920, your petitioner was desirous of purchasing property known as 2604 Connecticut Avenue, northwest, and the vacant lot north of same, having as a purpose to build a house to be used as a drug store on the vacant lot, but before purchasing said property, your petitioner, through her real estate agent and other persons representing her went to the District Building and advised with the Building Inspector of her purpose and desire to purchase this property and also of her purpose to build a store for business purposes on the vacant lot, and was advised by the Building Inspector, or those in his office authorized by him to speak for him that there were no restrictions or regulations of any kind, and no obstacles of any kind to prevent your petitioner after the property was purchased to build a building upon said vacant lot for business purposes.

Petitioner further says that these same parties interviewed the Surveyor's office of the District of Columbia with the result that petitioner, through her agents, was advised that in so far as the Surveyor's office was concerned, there was nothing known to them which would in anywise interfere with or prevent the erection of a building on this vacant lot for business purposes.

4. Petitioner further says that thereafter, and on the day that the contract was signed for the purchase of said property, by her, her father and her real estate agent, D. S. Gordon, went to the Building Inspector's office again and advised the Building Inspector's office of petitioner's purpose and desire to purchase this property and again inquired of them if there was anything that would interfere with petitioner, or if there was any regulation or restriction which would in anywise interfere with or prevent here erecting a building on the vacant lot to be used as a drug store, as it was her purpose and intention to sign a contract that day to purchase said property if there were no restrictions or regulations against the use of the vacant lot for the purposes above stated, and again the Building Inspector's office advised your petitioner through her said representatives that there was no regulation or restriction of any kind against the construction of a house or building upon said vacant property for business purposes, and upon petitioner being so advised, and after knowledge thereof, she entered into an agreement on said date, to wit, April 30th, 1920, with K. E. Lloyd, the owner of said property to purchase said property, which said contract is as follows:

Washington, D. C., April 30th, 1920.

Received of Mollie Schwartz a deposit of Five Hundred ($500.00) Dollars, to be applied as part payment on purchase of Lot — Square

— 2604 Conn. Ave., N. W. and vacant lot north of same, Washington, D. C., with the improvements thereon.

3 Price of property, $25,500. Terms $10,000 cash, balance $1,000 1 yr. $100.00 2 yrs. $3,000.00 3 yrs. $10,500 5 yrs. All notes "on or before." The largest note curtailable in $1,000 payments secured by Deed of Trust $15,500 on the above property; with interest at the rate of 6 per cent per annum, payable Semi Annually.

The deposit to be refunded unless a good record title is given.

Taxes paid to transfer. Rents to transfer. Conveyancing at cost of purchaser.

Purchaser is required to make full settlement, in accordance with the terms of sale, within 60 days from this date, or the deposit will be forfeited.

In the event of forfeiture of deposit, the purchaser shall not be relieved of his responsibility to comply with the terms of sale.

(Signed) MOLLIE SCHWARTZ.
D. S. GORDON, *Agt.*

Tender will pay Gordon regular brokers ass'n brokerages for sale.
(Signed) KATE E. LLOYD.

Appearing on the back of said contract is the following:

It is understood between buyer and seller that buyer will pay to Columbia Title Co. the balance of cash. Pay must be called for when possession is given.

(Signed) O. K.
E. L.

Papers to be drawn by Crandal Mackey. Seller—has deposit. Case 73336.

5. Petitioner further avers and says that she immediately thereafter, and with due and reasonable diligence, employed an architect to prepare plans and specifications to erect a building on said vacant lot, and on, to wit, May 26th, 1920, she filed with the Building Inspector an application for a permit to build a store house on said vacant lot at a cost to petitioner of $6,500. Petitioner says that she furnished the Building Inspector's office with said application and the plans and specifications for said building which were in every respect in accordance with the building regulations, and which were in every respect acceptable to the Building Inspector's office and to the Plumbing Department, and in fact, the plans were duly approved by the Plumbing Department as being correct and acceptable to them in every respect as complying with the law. The plans were structurally approved by the Building Department, in fact, they were correct in every particular and a permit would have been issued thereon except that it was contended by the respondent Healy that some new regulation had been passed since the information had been given by his office to petitioner to construct a building for business purposes on said lot and that it would be necessary for the petitioner

to obtain the written consent of the owners of three-fourths of the property within a radius of 200 feet of the said proposed building

6. Petitioner further avers and says that without waiving any of her rights under the application heretofore filed, she used reasonable effort to obtain the signatures of the property owners, but found that she was unable to get their consent and thereafter on, to wit, the 4th day of June, advised the Building Inspector of that fact as shown by letter, copy of which is as follows:

Washington, D. C., June 4th, 1920.

John C. Healy, Esq.,
District Building,
Washington, D. C.

DEAR SIR:

Since notice to me from your office that my application for a permit to build for business purposes on my lot north of #2604 Connecticut Ave., N. W., would not be granted except upon consent of the owners of 75% of the property within a radius of 200 feet, I wish to say that I have made every effect to obtain the signatures of the owners within this radius without success.

In view of the fact that when this property was purchased by me, my father, acting for me, went to your office and was told that a building permit would be granted and that there were no building restrictions and nothing known to the office that would prevent the permit being granted, and in addition thereto, Mr. Gordon, the agent who made the sale, as well as my father, went to your office and received the same advice, and in view of the fact that the plans and specifications are correct in every detail, and even approved and passed by the plumbing department, I now request, as a citizen, the rights which I understand belong to me, that is, that the permit be issued to me to build on this lot.

If the permit is refused, then such action would result in a very serious loss to me, since I paid a large price for this property after having been advised by your office that there was nothing to interfere with my plan to build on this ground.

Will you kindly advise me by return mail what action you propose?

Very truly yours,
(Signed) _____,
2406 14th St. N. W.

7. Therefore, to wit, on June 5th, 1920, your petitioner received the following letter from the Building Inspector:

Mrs. Mollie Swortz, June 5, 1920.
2406 14th St. N. W.,
Washington, D. C.

DEAR MADAM:

In reply to your letter of the 4th instant with reference to permit to erect building for business purposes on the lot north of 2604 Connecticut Avenue, I have to advise you that on May 24th, 1920, the Commissioners enacted an amendment to the building regulations to be known as Section 167-*a*, and providing in part that

"On a residence street where there is no property on the same block occupied and used for business purposes, no permit for the establishment or conduct of a business of any character, retail or wholesale, shall be granted until there shall be filed the written consents of the owners of three-fourths of the property within 200 feet of the site of the proposed establishment. * * *"

As the block of Connecticut Avenue on which is situate (*d*) the lot referred to is a residence street, and as you desire to erect a building for business purposes it will be seen that permit may not issue until the consents of property owners shall have been obtained and filed in the manner prescribed by the section above mentioned.

The statement that your plans were approved by the plumbing department is of course accepted as correct.

Any information given or opinion expressed by this office was given or expressed prior to the promulgation of the regulation quoted.

Very respectfully,
(Signed) JOHN P. HEALY,
Inspector of Buildings.

J. R.—N.

8. Petitioner says that every reasonable effort and precaution was taken by her to protect herself before purchasing said property and that great damage will be done her if she cannot obtain a permit to build said building, since she has expended this large sum of money for the purchase of said property, and therefore, she asks the aid of the Court in this proceeding.

9. Petitioner further says that the said regulation is void and is beyond the scope and power of the Commissioners; that the Commissioners have by said regulation undertaken to restrict the use and benefits of the petitioner in the lawful and proper use and benefit of her property, and that the use for which said building is to be constructed and used would not in anywise interfere with the peaceful enjoyment of all surrounding property owners and occupants of all surrounding houses and dwellings, or would in anywise be injurious to the property in its vicinity or be subject in anywise to abatement of a nuisance, private or public.

10. Petitioner says that on March 1st, 1920, the Congress of the United States passed a law entitled

"An Act to regulate the height, area and use of building in the District of Columbia, and to create a zoning commission, and for other purposes."

This law by its terms provided that

"Within six months after the passage of this act, and after public notice and hearing as hereinafter provided, the said commission shall divide the District of Columbia into certain districts, to be known, respectively, as height, area, and use districts, and shall adopt
6 regulations specifying the height and area of buildings thereafter to be erected or altered therein and the purposes for which buildings and premises therein may be used."

The said Act further provides that public notice and hearings as provided in said Act shall be after

"Notice of the time and place of such hearing shall be published for not less than ten consecutive days in one or more newspapers of general circulation, printed and published in the District of Columbia."

Petitioner is advised, and therefore states as a fact, that no publication has been had under this Act of March 1st, 1920, and therefore, no regulations or orders could lawfully be passed under the provisions of said Act.

Petitioner further says that the provisions of this Act above quoted, to wit, the Act of March 1st, 1920, in Section 11 thereof provides:

"That all laws in conflict with the provisions of this Act are hereby repealed."

Petitioner avers and says therefore, that under the Act of March 1st, 1920, all right and privilege of determining the purpose for which buildings could be erected or used was entirely in the hands of the Commission born and created by the terms of said Act, and there was no power left in the Commissioners of the District of Columbia to pass any regulation such as that attempted to be passed by them, or as is claimed to have been passed by them under date of May 24th, 1920.

Therefore, premises considered petitioner prays:

1. That a writ of mandamus may issue out of this Honorable Court, directed to the Relators and each of them, requiring them to appear in this court and answer this Petition, and show cause, if any they have, why a Writ of Mandamus should not be issued against them, requiring them to issue to your Petitioner a permit to build a building for business purposes on the vacant lot purchased by her as pleaded in this Petition.

2. And that your Petitioner may have such other, further and general relief as she may be entitled to, and as to the court may seem just, reasonable and proper.

MOLLIE SCHWARTZ,
Petitioner.

JOSEPH B. STEIN,
J. D. EASON, JR.,
SOUTH TRIMBLE, JR.,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *To wit:*

Mollie Schwartz being first duly sworn, on oath deposes and says that she has read the foregoing Petition by her subscribed and
7 knows the contents thereof; that the matters and things therein contained as of her own knowledge are true, and those stated upon information and belief, she believes to be true.

MOLLIE SCHWARTZ.

Subscribed and sworn to before me, a Notary Public, in and for the District of Columbia, this 9th day of June, A. D. 1920.

[SEAL.] KATHERINE A. BAKER,
Notary Public, D. C.

Rule to Show Cause.

Filed June 9, 1920.

* * * * * * *

Upon consideration of the petition in the above entitled cause it is by the Court this 9th day of June, A. D. 1920

Ordered, That the said respondents, and each of them, show cause before this Court on Friday next, June 11th, 1920, at ten o'clock a. m., or as soon thereafter as counsel may be heard, if any they have, why a Writ of Mandamus should not be issued against them, requiring them to issue to said petitioner a building permit to construct a building on the property mentioned in said petition.

Provided a copy of this rule be served on said respondents not later than the 9th day of June, A. D. 1920.

By the Court,

WILLIAM HITZ,
Justice.

Answer to Petition and Return to Rule.

Filed June 11, 1920.

* * * * * * *

The respondents, Louis Brownlow and Charles W. Kutz, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, for answer to petition for writ

of mandamus filed herein, and as a return to the rule to show cause issued on said petition, respectfully state as follows:

1 and 2. Respondents admit as true the allegations of the first two paragraphs of said petition.

3. Answering paragraph three of said petition, respondents state that they cannot answer as to the desire or state of mind of the petioner concerning the property mentioned in said paragraph, but respondents believe the other allegations of said paragraph to be substantially correct.

4. Answering paragraph four of said petition, respondents state that they are without personal knowledge, and that they therefore cannot either admit or deny the allegations thereof that the
8 visit of petitioner's father and her agent to the office of the Building Inspector was the day on which the contract referred to in said paragraph was signed, but, concerning the other allegations of said paragraph, these respondents believe the same to be substantially correct, except that they have no personal knowledge, and therefore cannot either admit or deny either the contents or the execution of the contract therein set forth.

5. Answering paragraph five of said petition, these respondents are without such knowledge as enables them either to admit or deny the allegations thereof concerning the employment of an architect by petitioner. They admit that on the 26th day of May, 1920, she filed with the Building Inspector the application for a permit to build alleged in said paragraph, and furnished the Building Inspector's office with said application and the plans and specifications for said building. Concerning the allegations of said paragraph, that said plans or specifications were in every respect in accordance with the building regulations and were in every respect acceptable to the Building Inspector's office and were correct in every particular, these respondents say that they cannot either admit or deny said allegations, but if material herein demand strict proof thereof and further state concerning said allegations that no examination was made of said plans or specifications by the office of said Building Inspector, to determine whether the same were acceptable as alleged, or were correct and in compliance with the Building Regulations, for the reason that it appeared upon the face of said plans and specifications, and the application for permit to build in accordance therewith, that said permit could not be granted because of the existence of the Building Regulations set out in paragraph seven of the petition herein, and therefore they deny that said plans and specifications were structurally approved as alleged. That as said Building Regulation was, at the time aforesaid, in full force and effect, the structural details concerning the building for which permit was sought to be obtained by petitioner were matters of no consequence to the office of the Building Inspector as the existence of said Building Regulation made it unlawful to issue said permit, regardless of the details of the plans and specifications aforesaid.

6 and 7. Answering the allegations of paragraphs six and seven, these respondents admit the same to be substantially correct.

8. Answering paragraph eight of said petition, respondents submit that the allegations thereof are immaterial because of the matters hereinafter set forth.

9. Answering paragraph nine of said petition, these respondents respectfully submit that the allegations thereof present questions of law, which it is unnecessary for them to answer herein, although they deny the correctness of the conclusions stated by petitioner in said paragraph.

10. Answering paragraph ten of said petition, respondents admit the enactment by Congress of the law therein referred to, and for greater certainty refer to the provisions of said law. Further answering said paragraph, respondents deny the correctness of the legal conclusions alleged by petitioner concerning the operation thereof to deprive the Commissioners of the District of Columbia of the power to pass the Building Regulation in controversy in this
9 cause, and state that the legal operation and effect of said Act of Congress presents a question of law for the determination of this Court upon the argument of this case.

Further answering said petition, and each paragraph thereof, these respondents state that by Act of Congress approved June 14th, 1878, the Commissioners of the District of Columbia were authorized and directed to make and enforce such Building Regulations for the said District as they might deem advisable, and that such regulations, under the provisions of the Act of Congress aforesaid, shall have the same force and effect within the District of Columbia as if enacted by Congress. That pursuant to the power and authority vested in them by the Act aforesaid, the respondents, Louis Brownlow and Charles W. Kutz, as Commissioners of said District of Columbia, made and promulgated on, to wit, May 24th, 1920, the Building Regulation set forth in paragraph numbered seven of the petition herein, whereupon it became unlawful to issue to this petitioner the permit which she seeks to obtain in this proceeding.

Further answering said petition, said respondent Commissioners submit that, as the matter of the issuance of building permits is vested by law in the Inspector of Buildings of the District of Columbia, said respondent Commissioners are improper parties hereto.

And having fully answered, these respondents pray to be dismissed.

LOUIS BROWNLOW,
C. W. KUTZ,
Commissioners of the District of Columbia.
JOHN P. HEALY,
Inspector of Buildings, District of Columbia.

F. H. STEPHENS,
P. H. MARSHALL,
Attorneys for Respondents.

DISTRICT OF COLUMBIA, *ss:*

Louis Brownlow and Charles W. Kutz, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, oath say that they have read the foregoing answer and return by them subscribed, and know the contents thereof, and that they verily believe the facts therein stated to be true.

LOUIS BROWNLOW,
C. W. KUTZ,
Commissioners of the District of Columbia.
JOHN P. HEALY,
Inspector of Buildings, District of Columbia.

Subscribed and sworn to before me this tenth day of June, 1920.
[SEAL.] JAMES C. WILKES,
Notary Public, District of Columbia.

10 *Demurrer to Return.*

Filed June 12, 1920.

* * * * * * *

Comes now the petitioner, by *his* counsel, and demurs to the answer of the Commissioners of the District of Columbia and the Building Inspector of the District of Columbia, filed in the above entitled cause, and for reasons therefor says:

First. That the answer does not set up a defense to the allegations of the petitioner.

Second. And for other further and general reasons as shown upon the face of the pleadings.

JOSEPH B. STEIN,
J. D. EASON, JR.,
SOUTH TRIMBLE, JR.,
Attorneys for Petitioner.

To Francis H. Stephens and P. H. Marshall, Esqs.,
Attorneys for Respondents:

Take notice that the above demurrer will be called to the attention of the Court, Friday, June 18th, 1920, at ten o'clock a. m., or as soon thereafter as counsel can be heard.

JOSEPH B. STEIN,
J. D. EASON, JR.,
SOUTH TRIMBLE, JR.,
Attorneys for Petitioner.

Amendment to Return.

Filed June 25, 1920.

* * * * * * *

After leave of the Court first had and obtained, the respondents amend their answer, heretofore filed herein to the petition for writ of mandamus, and return to rule to show cause herein, as follows:

By striking out so much of their said answer in Paragraph 1, as admits that the petitioner, Mollie Schwartz, files this suit in her own right. These respondents say that, since the filing of their said answer, they are informed and believe, and therefore aver that the said petitioner, Mollie Schwartz, did not file this suit in her own right, but on the contrary, filed the same in behalf of another, namely, one Simon Spigel, who, as respondents are informed and believe, and therefore aver, is the real party in interest; that said respondents are informed and believe, and therefore aver that although the said Mollie Schwartz signed a contract on or about April 30, 1920, merely agreeing to purchase 2604 Connecticut Avenue, Northwest, and the vacant lot immediately north of the same, in the City of Washington, District of Columbia, and that she
11 has not acquired title thereto, but said respondents are informed and believe, and therefore aver that it is the intention of the said Mollie Schwartz and the said Simon Spigel, if the said contract to purchase is ever consummated, that the title to the said property including the lot north of the said premises, be placed in the name of the real purchaser, the said Simon Spigel.

LOUIS BROWNLOW,
CHARLES W. KUTZ,
Commissioners of the District of Columbia,
JOHN P. HEALEY,
Inspector of Buildings for the District of Columbia.
By P. H. MARSHALL,
Ass't Corporation Counsel, D. C.

F. H. STEPHENS,
P. H. MARSHALL,
Attorneys for Respondents.

DISTRICT OF COLUMBIA, *To wit:*

Percival H. Marshall, on oath says that he has read the foregoing amendment to the answer of the respondents and return to the rule to show cause issued herein, by him subscribed, and he knows the contents thereof, and he verily believes the allegations therein stated to be true.

PERCIVAL H. MARSHALL.

DISTRICT OF COLUMBIA, *ss:*

Louis Brownlow and Charles W. Kutz, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, oath say that they have read the foregoing answer and return by them subscribed, and know the contents thereof, and that they verily believe the facts therein stated to be true.

LOUIS BROWNLOW,
C. W. KUTZ,
Commissioners of the District of Columbia.
JOHN P. HEALY,
Inspector of Buildings, District of Columbia.

Subscribed and sworn to before me this tenth day of June, 1920.
[SEAL.] JAMES C. WILKES,
Notary Public, District of Columbia.

10 *Demurrer to Return.*

Filed June 12, 1920.

* * * * * * *

Comes now the petitioner, by *his* counsel, and demurs to the answer of the Commissioners of the District of Columbia and the Building Inspector of the District of Columbia, filed in the above entitled cause, and for reasons therefor says:

First. That the answer does not set up a defense to the allegations of the petitioner.

Second. And for other further and general reasons as shown upon the face of the pleadings.

JOSEPH B. STEIN,
J. D. EASON, JR.,
SOUTH TRIMBLE, JR.,
Attorneys for Petitioner.

To Francis H. Stephens and P. H. Marshall, Esqs.,
Attorneys for Respondents:

Take notice that the above demurrer will be called to the attention of the Court, Friday, June 18th, 1920, at ten o'clock a. m., or as soon thereafter as counsel can be heard.

JOSEPH B. STEIN,
J. D. EASON, JR.,
SOUTH TRIMBLE, JR.,
Attorneys for Petitioner.

Amendment to Return.

Filed June 25, 1920.

* * * * * * *

After leave of the Court first had and obtained, the respondents amend their answer, heretofore filed herein to the petition for writ of mandamus, and return to rule to show cause herein, as follows:

By striking out so much of their said answer in Paragraph 1, as admits that the petitioner, Mollie Schwartz, files this suit in her own right. These respondents say that, since the filing of their said answer, they are informed and believe, and therefore aver that the said petitioner, Mollie Schwartz, did not file this suit in her own right, but on the contrary, filed the same in behalf of another, namely, one Simon Spigel, who, as respondents are informed and believe, and therefore aver, is the real party in interest; that said respondents are informed and believe, and therefore aver that although the said Mollie Schwartz signed a contract on or about April 30, 1920, merely agreeing to purchase 2604 Connecticut Avenue, Northwest, and the vacant lot immediately north of the same, in the City of Washington, District of Columbia, and that she
11 has not acquired title thereto, but said respondents are informed and believe, and therefore aver that it is the intention of the said Mollie Schwartz and the said Simon Spigel, if the said contract to purchase is ever consummated, that the title to the said property including the lot north of the said premises, be placed in the name of the real purchaser, the said Simon Spigel.

LOUIS BROWNLOW,
CHARLES W. KUTZ,
Commissioners of the District of Columbia.
JOHN P. HEALEY,
Inspector of Buildings for the District of Columbia.
By P. H. MARSHALL,
Ass't Corporation Counsel, D. C.

F. H. STEPHENS,
P. H. MARSHALL,
Attorneys for Respondents.

DISTRICT OF COLUMBIA, *To wit:*

Percival H. Marshall, on oath says that he has read the foregoing amendment to the answer of the respondents and return to the rule to show cause issued herein, by him subscribed, and he knows the contents thereof, and he verily believes the allegations therein stated to be true.

PERCIVAL H. MARSHALL.

Subscribed and sworn to before me this 25th day of June, 1920.

MORGAN H. BEACH,
Clerk.
ALF G. BUHRMAN,
Ass't Clk.

Intervening Petition of Mabel H. Simon.

Filed June 25, 1920.

* * * * * * *

To the Honorable the Supreme Court of the District of Columbia:

The petitioner, Mabel H. Simon, respectfully shows to the Court:

1. That she is a citizen of the United States and a resident of the District of Columbia, and files this petition in her own right.

2. Your petitioner is the owner in fee simple of the following-described lands and premises in the District of Columbia;

Lot 116 in Franklin T. Sanner and William A. Hill's Subdivision of part of Lot 97 in "Waggaman and Ridout, Trustees' Addition, in the City of Washington," as per plat of said first-named subdivision recorded in Liber No. 38, folio 89 of the Records of the Office of the Surveyor of the District of Columbia.

Said land is improved by premises numbered twenty-six hundred ten (2610) Connecticut Avenue, Northwest being in the
12 same street and square as the premises to compel the issuance of a permit to erect a store building on which the relator filed her petition herein.

3. Your petitioner avers that the proposed store, if allowed to be erected and operated, will constitute a nuisance and detriment and a source of special annoyance to her and her property, and lessen the safe and comfortable enjoyment thereof, and permanently depreciate its value.

4. Your petitioner is advised and believes, and therefore avers, that the relator is not a proper party to bring this action, for that said relator has not now, and had not at the time of the filing of her petition herein, title to the real estate in question, and that she does not intend to take title thereto but she intends to have title thereto taken by one Simon Spigel, whereas Section 21 of the Building Regulations of the District of Columbia provides, inter alia, as follows:

"Applications for [building] permits shall be made in writing by the owner and submitted in person, or be signed by the owner and witnessed by his builder, architect, or authorized agent, or signed with power of attorney for owner, or by proper officer or member of a corporation, company, or firm. * * *"

Your petitioner therefore prays:

1. That she be permitted to intervene herein, and to join with the respondents in resisting the attempt to compel the issuance of a permit as prayed in the petition herein filed.

2. And that your petitioner may have such other and further relief as the nature of the case may require and to this Honorable Court seem meet and proper.

MABEL H. SIMON,
By LOUIS SIMON.

KING, SIMON, YOUNG & KOENIGSBERGER,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

Louis Simon, being first duly sworn according to law, deposes and says that he is the agent of Mabel H. Simon, the above-named petitioner, that he is authorized to sign the foregoing petition on behalf of said petitioner, and that he so signed the same; that he has personal knowledge of the facts in said petition set forth and that he verily believes that the allegations in said petition contained are true.

LOUIS SIMON.

Subscribed and sworn to before me this 18 day of June, 1920.
MORGAN H. BEACH,
ALF G. BUHRMAN,
Ass't Cl'k.

(Endorsed:) June 25, 1920. Leave to file within petition hereby granted. William Hitz, Justice.

13 *Petition of Kate E. Lloyd and Edward Lloyd to Intervene.*

Filed July 2, 1920.

* * * * * * *

Your petitioners respectfully represent to this Honorable Court:

1st. That they are the record owners of the property described in the original petition in the above entitled cause; they having sold the same to Mollie Schwartz under date of April 30th, 1920, a copy of said contract being correctly set forth in the original petition in this cause.

2nd. They are desirous of joining in that petition and request leave of the Court to permit them to intervene and be made parties with the petitioner, asking all relief prayed for by the original petitioner in her said original petition.

Therefore premises considered petitioners pray:

1st. That an order may be passed herein authorizing and permitting your petitioners to be made parties with the complainant, praying for the same relief and remedies and all of the said reliefs and remedies asked for and prayed for by the original petitioner in this cause.

KATE E. LLOYD.
EDWARD LLOYD.

W. GWYNN GARDINER,
Atty for Petitioners.

We, Kate E. Lloyd and Edward Lloyd, being first duly sworn, on oath depose and say that we have read the original petition and this petition subscribed to by us and know the contents thereof; that the matters and things therein contained of our own knowledge are true and those upon information and belief, we believe to be true.

KATE E. LLOYD.
EDWARD LLOYD.

Subscribed and sworn to before me Katherine A. Baker, a Notary Public, in and for the District of Columbia this 30th day of June, 1920.

[SEAL.] KATHERINE A. BAKER.
Notary Public, D. C.

(Endorsed:) Granted July 2/20. William Hitz, J.

14 Supreme Court of the District of Columbia.

Tuesday, July 6, 1920.

Session resumed pursuant to adjournment, Mr. Justice Bailey presiding.

* * * * * * *

Before Justice Hitz.

The demurrer of petitioner filed herein, to the answer of respondents heretofore submitted to the Court is, upon consideration thereof, ordered to be, and the same is hereby overruled.

Wherefore it is considered that the rule to show cause herein be, and the same is hereby discharged, the petition is dismissed, and that the respondents recover of petitioner the costs of their defense, to be taxed by the Clerk, and have execution thereof.

From the foregoing judgment the petitioner by her Attorney in open Court, notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of a bond for costs on said appeal is hereby fixed in the sum of one hundred dollars ($100), or, in lieu thereof, a deposit of Fifty dollars ($50).

Memorandum.

July 26, 1920.—Bond for costs on appeal approved and filed.

Assignments of Error.

Filed July 26, 1920.

* * * * * * *

First Assignment of Error.

The Court erred in overruling the demurrer to the answer.

Second Assignment of Error.

The Court erred in discharging the rule to show cause herein.

Third Assignment of Error.

The Court erred in dismissing the petition of petitioner.

Fourth Assignment of Error.

The Court erred in holding that the answer states sufficient facts to constitute a defense to the petition.

Fifth Assignment of Error.

The court erred in permitting others to file intervenor petitions as defendants.

W. GWYNN GARDINER,
JOSEPH B. STEIN,
J. D. EASON, JR.,
Attorneys for the Plaintiff.

15 To F. H. Stephens and P. H. Marshall, Esqs.,
Attorneys for respondents herein:

Please take notice that the plaintiff herein has this 26 day of July, 1920, filed the foregoing assignments of error with the Clerk of said Court.

W. GWYNN GARDINER,
JOSEPH B. STEIN,
J. D. EASON, JR.,
Attorneys for the Plaintiff.

Designation of Record.

Filed July 26, 1920.

* * * * * * *

To Morgan H. Beach, Esq.,
Clerk of the above entitled court:

You will please include in the record on appeal to the Court of Appeals in the above entitled cause, the following:

1. Petition for writ of mandamus.
2. Rule to show cause.
3. Answer of respondents.
4. Demurrer to answer.
5. All intervenor petitions filed by others as defendants.
6. Intervenor petition filed by Kate E. Lloyd and Edward Lloyd.
7. Order of the court overruling the demurrer, discharging the rule to show cause and dismissing the petition for writ of mandamus.
8. Notice of appeal in open court and order fixing bond on appeal.
9. Memorandum of filing and approving bond on appeal.
10. Assignments of Error.
11. This Designation.

W. GWYNN GARDINER,
JOSEPH B. STEIN,
J. D. EASON, JR.,
Attorneys for the Petitioner.

To F. H. Stephens and P. H. Marshall, Esqs.,
Attorneys for respondents herein:

Please take notice that the plaintiff herein has this 26 day of July, 1920, filed the foregoing designation of record with the clerk of said Court.

W. GWYNN GARDINER,
JOSEPH B. STEIN,
J. D. EASON, JR.,
Attorneys for the Petitioner.

16 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to

22, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 63778 at Law, wherein Mollie Schwartz is Petitioner and Louis Brownlow, Charles W. Kutz, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, are Respondents, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of August, 1920.

[Seal Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

E. W.

Endorsed on cover: District of Columbia Supreme Court. No. 3450. Mollie Schwartz, appellant, vs. Louis Brownlow et al. Court of Appeals, District of Columbia. Filed Aug. 30, 1920. Henry W. Hodges, clerk.

17 Monday, December 6th, A. D. 1920.

No. 3450.

MOLLIE SCHWARTZ, Appellant,

vs.

LOUIS BROWNLOW, CHARLES W. KUTZ, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia.

and

No. 3453.

W. WALTON EDWARDS, Appellant,

vs.

LOUIS BROWNLOW, CHARLES W. KUTZ, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia.

The argument in the above entitled causes was commenced by Mr. W. G. Gardiner, attorney for the appellants.

Tuesday, December 7th, A. D. 1920.

No. 3450.

MOLLIE SCHWARTZ, Appellant,

vs.

LOUIS BROWNLOW, CHARLES W. KUTZ, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia,

and

No. 3453.

W. WALTON EDWARDS, Appellant,

vs.

LOUIS BROWNLOW, CHARLES W. KUTZ, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia.

The argument in the above entitled causes was continued by Mr. R. L. Williams, attorney for the appellees, and was concluded by Mr. W. G. Gardiner, attorney for the appellants.

18 In the Court of Appeals of the District of Columbia.

No. 3450.

MOLLIE SCHWARTZ, Appellant,

vs.

LOUIS BROWNLOW, CHARLES W. KUTZ, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, Appellees.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

This appeal is from a judgment of the Supreme Court of the District of Columbia refusing a writ of mandamus to compel the Commissioners and Building Inspector of the District to issue a permit for the erection of a drug store on a lot situated in a residence block in the City of Washington.

The application for the permit was filed with the inspector on May 26, 1920, and approved by the plumbing inspector and structurally approved by the building inspector. The permit, however, was refused because of an ordinance adopted by the Commissioners three

days before, which provided as follows: "On a residence street where there is no property on the same block occupied and used for business purposes, no permit for the establishment or conduct of a business of any character, retail or wholesale, shall be granted until there shall be filed the written consents of the owners of three-fourths of the property within two hundred feet of the site of the proposed establishment."

The Commissioners base their authority for adopting this regulation upon the act of Congress of June 14, 1878, (20 Stats. L., 131,) which is as follows: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioners of the District of Columbia be, and they hereby are, authorized and directed to make * * * such building regulations for the said District as they may deem advisable." The act then provides that the rules and regulations so made shall have the same force and effect as if enacted by Congress.

Whether the adoption of the ordinance in question was a constitutional exercise of police power by the Commissioners need not be considered, since their action is in direct conflict with the act of Congress of March 1, 1920, creating a zoning commission, which, among other things, provides: "Within six months after the passage of this act and after public notice and hearing as hereinafter provided, the said commission shall divide the District of Columbia into certain districts, to be known, respectively, as height, area, and use districts, and shall adopt regulations specifying the height and area of buildings hereafter to be erected or altered therein and the
19 purposes for which buildings and premises therein may be used." The act provides for notice and hearings before the adoption of such regulations, and further provides that "all laws in conflict with the provisions of this act are hereby repealed."

Nor is the power of the Commissioners to make regulations affecting the use of property strengthened by section 10 of the zoning act, which provides: "That the Commissioners of the District of Columbia shall enforce the provisions of this act and the orders and regulations adopted by said Zoning Commission under the authority thereof, and nothing herein contained shall be construed to limit the authority of the Commissioners of the District of Columbia to make municipal regulations as heretofore: Provided, That such regulations are not inconsistent with the provisions of this law and the orders and regulations made thereunder."

While the Commissioners are given power to enforce regulations adopted by the zoning commission, they are expressly prohibited from making regulations inconsistent with the act or regulations made by the zoning commission thereunder. The legislative power conferred by the act is in the zoning commission, and not in the Commissioners of the District of Columbia.

While the six months' period within which the zoning commission was required to act had not expired at the time of the adoption of the present regulation, the repealing clause of the zoning act was in presenti and operated immediately to deprive the Commissioners

of the District of jurisdiction to enact building regulations in conflict with the jurisdiction conferred upon the zoning commission.

The regulation in question attempts to regulate the use to which petitioner could put her building, which is the chief jurisdiction conferred upon the zoning commission.

The judgment is reversed with costs, and the cause is remanded with directions to issue the writ as prayed for in the petition.

Reversed and remanded.

January Term, 1921.

Monday, February 7th, A. D. 1921.

No. 3450.

MOLLIE SCHWARTZ, Appellant,

vs.

LOUIS BROWNLOW, CHARLES W. KUTZ, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said Supreme Court with directions to issue the writ as prayed for in the petition.

Per MR. JUSTICE VAN ORSDEL.

February 7, 1921.

In the Court of Appeals of the District of Columbia.

No. 3450.

MOLLIE SCHWARTZ, Appellant,

vs.

LOUIS BROWNLOW, CHARLES W. KUTZ, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, Appellees.

Come now Louis Brownlow and Charles W. Kutz, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, and move the Court to grant a rehearing and reargument of the appeal herein, and for grounds for said motion, respectfully show to the Court:

1. That the opinion of the Court does not take into consideration the fact, as appears on page 10 of the printed record herein, that the relator at the time she made the application for a building permit was not the owner of the real estate in respect of which application for a permit was made, and had not complied with Section 21 of the Building Regulations as follows:

"Applications for (building) permits shall be made in writing by the owner and submitted in person, or be signed by the owner and witnessed by his builder, architect, or authorized agent, or signed with power of attorney for owner, or by proper officer or member of a corporation, company or firm. * * *"

(Record page 12.)

2. That the Court erred in deciding that the power of the Commissioners to enact Section 167*a* of the Building Regulations had been abolished by the Act of March 1, 1920, entitled "An Act to regulate the height, area and use of buildings in the District of Columbia, and to create a Zoning Commission, and for other purposes," as Section 2 of said act provides that it shall not take effect until such period, within 6 months after the day of its passage, as regulations should have been made pursuant thereto.

McAuley vs. Reynolds, 64 Maine 134.
Leyner vs. State, 8 Indiana 492.
Rogers vs. Vass, 6 Iowa 408.
Iroquois Co. vs. Keady, 34 Ill. 293.
Rice vs. Ruddiman, 10 Mich. 135.
Evansville & Crawfordsville R. R. Co. vs. Barbee, 59 Ind. 592.
State vs. Bemis, 45 Neb. 724.

21 Endlich on the interpretation of statute, section 489, see generally Carr vs. W. & O. D. R. Co. 44 App. D. C. 533.

3. In holding that the power of the Commissioner- to enact said regulation was not saved by Section 10 of said act, as follows:

"That the Commissioners of the District of Columbia shall enforce the provisions of this Act and the orders and regulations adopted by said Zoning Commission under the authority thereof, and nothing herein contained shall be construed to limit the authority of the Commissioners of the District of Columbia to make municipal regulations as heretofore: Provided, That such regulations are not inconsistent with the provisions of this law and the orders and regulations made thereunder. In interpreting and applying the provisions of this Act and of the orders and regulations made thereunder they shall be held to be the minimum requirements for the promotion of the public health, safety, comfort, convenience and general welfare. * * *"

Respectfully submitted,

F. H. STEPHENS,
ROBT. L. WILLIAMS,
Attorneys for Appellees.

Endorsed: No. 3450. Mollie Schwartz, Appellant, vs. Louis Brownlow et al. Motion for Rehearing. Court of Appeals. District of Columbia. Filed February 24, 1921. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 3450.

MOLLIE SCHWARTZ, Appellant,

vs.

LOUIS BROWNLOW et al., Appellees.

and

No. 3453.

W. WALTON EDWARDS, Appellant,

vs.

LOUIS BROWNLOW, CHARLES W. KUTZ, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, Appellees.

Answer of Appellant to the Motion of the Appellee to Grant a Rehearing and a Reargument of the Appeal Herein.

Counsel for appellants in Nos. 3450 and 3453 of the cases having been for trial in this Court have been served with motions for rehearing and reargument in both of said cases.

22 The opinion of the Court in these two cases was handed down on February 7, 1921, in both of which the Lower Court was reversed and direction to the Lower Court to issue the writ of mandamous as prayed for in the original petitions. In No. 3450, counsel are now undertaking for the first time to argue to the Court the proposition that the appellee, Mollie Schwartz, should not have been granted the writ of mandamous, because when she applied to the Building Inspector for the permit, the deed transferring the property to her had not been recorded, although it is conceded that she had purchased the property and was entitled to have the deed recorded.

It will be noted from the record that no such position was taken in the Lower Court and there has been no argument presented to this Court based upon any such contention.

After the District has had its day in Court and been defeated, its counsel is now trying *trying* to raise this new point.

Even had they raised this point originally it would have been of no avail to them.

By an examination of the record it will be found that no such contention was raised by the appellees in their answer to the petition

and rule to show cause, but long after the return day in the original rule the Court allowed one Mabel H. Simon to intervene (R. 11), and she, in her petition to intervene raised this point. Thereupon the Court promptly permitted Major Lloyd and his wife to intervene as parties plaintiff (R. 13). This was done by the Court so that the party holding the equitable title and the legal title might both be before the Court praying for the same relief. A technical position like this was sought to be injected into the case of Weeks versus Harrick (40 Appeals D. C. p. 46).

The Court in disposing of this question in that case said, on page 64 of that Volume:

"The only question before us is whether plaintiff is in position to maintain the present suit. He occupies such a position, and it is of no concern whether he elects to join with other persons similarly injured or not. The title to the property is not in issue; if it were, Roberts might be a necessary party, but the only injury here is the extent of the injury to plaintiff.

Counsel for the District seeks to have a reargument and a rehearing of this case upon the further ground that the Zoning Act did not take effect until six (6) months after its passage and they cite 44 Appeals, D. C. 533 and a number of decisions mentioned by this Court in this decision in this case as authority for such position.

I respectfully submit that 44 Appeals is no authority for their position in this case nor in any of the cases cited in their petition for rehearing filed in this Court.

In the case of 44 Appeals D. C., being Carr vs. Washington — Old Dominion Railroad, the Court was considering the Act of March 4, 1913, which by its language said (see page 538 of this volume):

"Paragraph 25 of the same section reads as follows: 'This section shall be in full force and effect from and after July 1, 1913'
23 and this Court said that the Act, while passed on March 4, became effective on July 1, 1913. In the case interpreted by this Court and cited by counsel, it will be seen that similar provisions were found in the various statutes under consideration by the Court in these several decisions.

In the case at bar the Court was considering the provisions of the Zoning Act. Section 11 of the Zoning Act provides that

"All laws or parts of laws in regulations in conflict with the provisions of this Act are hereby repealed."

This does not say that they are repealed six months after the passage of the Zoning Act, or at such time as the Zoning Commission shall publish its intention to hold public hearings and act thereon. It provides in positive language that they are repealed on the date of the passage of the Zoning Act and this Court in its opinion holds that "All laws in conflict with the provisions of this Act are hereby repealed."

Indeed, this Court says that while the Zoning Act may not become operative for six months as required by the Act, the repealing clause

of the Zoning Act was in presenti. For the Court says in the latter part of its decision.

"While the six months' period within which the Zoning Commission was required to act had not expired at the time of the adoption of the present regulation, the repealing clause of the Zoning Act was in presenti, and operated immediately to deprive the Commissioners of the District — jurisdiction to enact building regulations in conflict with the jurisdiction conferred upon the Zoning Commission."

We therefore respectfully submit that there is no force in the contention now sought to be made and that the appellants should not be deprived longer of the right to have their permits issued.

Respectfully submitted,

W. GWYNN GARDINER.

Endorsed: No. 3450. Mollie Schwartz, Appellant, vs. Louis Brownlow et al. Answer to Petition for Rehearing. Court of Appeals. District of Columbia. Filed March 5, 1921. Henry W. Hodges, Clerk.

Saturday, March 19th, A. D. 1921.

No. 3450.

MOLLIE SCHWARTZ, Appellant,

vs.

LOUIS BROWNLOW et al.

On consideration of the motion for a rehearing in the above entitled cause, It is by the Court this day ordered that said motion be, and the same is hereby, denied.

24 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Mollie Schwartz, appellant, and Louis Brownlow and Charles W. Kutz, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, appellees, No. 3450, No. 19, Special Calendar, a manifest error hath happened, to the great damage of the said Louis Brownlow, and Charles W. Kutz, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly

and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Joseph McKenna, Senior Associate Justice of the Supreme Court of the United States, the thirteenth day of twenty-one.
June, in the year of our Lord one thousand nine hundred and

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Court of Appeals District of Columbia. Filed Jun. 14, 1921. Henry W. Hodges, Clerk.

25 Know all men by these presents, That we, John P. Healy, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as principal, are held and firmly bound unto Mollie Schwartz in the full and just sum of Three hundred ($300.00) dollars, to be paid to the said Mollie Schwartz, her certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 13th day of June, in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately at a —, in a suit depending in said Court, between the Commissioners of the District of Columbia and the said Healy, Building Inspector of the said District, as plaintiffs in error, and the said Mollie Schwartz, as defendant in error, a judgment was rendered against the said Commissioners and the said Healy, and the said Commissioners and the said Healy having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mollie Schwartz citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Commissioners and the said Healy shall prosecute the writ of error to effect, and answer all damages and costs if they fail to make their

plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOHN P. HEALY. [SEAL.]

[Corporate Seal of Fidelity & Deposit Co. of Maryland.]

(Signed) FIDELITY & DEPOSIT CO. OF MD. [SEAL.]

(Signed) B. E. GERMANN, [SEAL.]
Attorney in Fact.

Sealed and delivered in presence of—
(Signed) A. C. JOHNSON.

Approved by—
(Signed) O. W. HOLMES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 3450. Mollie Schwartz, appellant, vs. Louis Brownlow et al. Bond on Writ of Error. Court of Appeals District of Columbia. Filed Jun. 14, 1921. Henry W. Hodges, Clerk.

26 UNITED STATES OF AMERICA, ss:

To Mollie Schwartz, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Louis Brownlow and Charles W. Kutz, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, this thirteenth day of June, in the year of our Lord one thousand nine hundred and twenty-one.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun. 14, 1921. Henry W. Hodges, Clerk.

On this 14th day of June, in the year of our Lord one thousand nine hundred and twenty-one, personally appeared Elisha B. Carrier before me, the subscriber, and makes oath that he delivered a true

copy of the within citation to W. Gwynn Gardiner, attorney for Mollie Schwartz the Defendant in Error, on June 14, 1921, at the office of said W. Gwynn Gardiner, Woodward Building, Washington, D. C., and also exhibited to his this the original citation, the original writ of error and the bond thereon.

ELISHA B. CARRIER.

Sworn to and subscribed the 14th day of June, A. D. 1921.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk Court of Appeals, D. C.

27 In the Court of Appeals of the District of Columbia, October Term, 1920.

No. 3450.

No. 19, Special Calendar.

MOLLIE SCHWARTZ, Appellant,

vs.

LOUIS BROWNLOW, CHARLES W. KUTZ, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, Appellees.

Assignment of Errors.

The above named appellees, Louis Brownlow, Charles W. Kutz, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, assign the following errors in respect to the final judgment and decision of the Court of Appeals of the District of Columbia in the above entitled cause:

1.

Because by the decision and judgment in this cause, there is drawn in question the validity of an authority exercised under the United States, or the existence or scope of a power or duty of an officer of the United States, and such authority or power or duty was denied by the Court of Appeals.

2.

Because the said decision and judgment of the Court of Appeals denied the authority or power or duty of the Commissioners of the District of Columbia to enact Building Regulation known as section 167*a*, promulgated by the Commissioners of the District of Columbia on May 24, 1920, pursuant to Acts of Congress of the United

States (20 Stat. at L. p. 131; 20 Stat. at L. p. 868; 27 Stat. at L. p. 394), which said building regulation 167*a* provides as follows:

"On a residence street where there is no property on the same block occupied and used for business purposes, no permit for the establishment or conduct of a business of any character, retail or wholesale, shall be granted until there shall be filed the written consents of the owners of three-fourths of the property within 200 feet of the site of the proposed establishment."

28

3.

Because by the said decision and judgment of the said Court of Appeals it is held that the said building regulation 167*a*, which provides for the written consents of the owners of three-fourths of the property within 200 feet of the site of the proposed establishment, is in direct conflict with the Act of Congress of March 1, 1920, creating a Zoning Commission (Public—153—66th Congress, H. R. 6863) entitled "An Act to Regulate the height, area, and use of buildings in the District of Columbia, and to create a Zoning Commission, and for other purposes," referred to in said decision of said Court of Appeals.

4.

Because the Court of Appeals, in and by its said decision and judgment in this cause, erroneously decides that by the terms and provisions of the said Zoning Act, so-called, the repealing clause in the said Zoning Act, so-called, was in presenti and operated immediately to deprive the Commissioners of the District of jurisdiction to enact building regulations in conflict with the jurisdiction conferred upon the Zoning Commission, created by said Zoning Act, so-called.

5.

Because the Court of Appeals, in and by its said decision and judgment in this case, erroneously decides that the said Zoning Act, so-called, deprived the Commissioners of the District of Columbia of the power to promulgate and enact on May 24, 1920, the aforesaid building regulation 167*a* for the District of Columbia, above quoted.

6.

Because the Court of Appeals, in and by its decision in this case, erroneously decides as follows:

"Nor is the power of the Commissioners to make regulations affecting the use of property strengthened by section 10 of the Zoning Act, which provides: 'That the Commissioners of the District of Columbia shall enforce the provisions of this act and the orders

and regulations adopted by said Zoning Commission under the authority thereof, and nothing herein contained shall be construed to limit the authority of the Commissioners of the District of Columbia to make municipal regulations as heretofore: Provided, that such regulations are not inconsistent with the provisions of this law and the orders and regulations made thereunder.'"

29 61/2.

Because the Court of Appeals, in and by its decision in this case, erroneously decides that the legislative power, on May 24, 1920, in and by the said Zoning Act, so-called, to enact building regulations for the District of Columbia was in the Zoning Commission, and not in the Commissioners of the District of Columbia.

7.

Because the Court of Appeals erred in not deciding that on May 24, 1920, the legislative power to enact building regulations in and for the District of Columbia, was in the Commissioners of the District of Columbia, and in not holding that the said Commissioners had the power to promulgate and enact building regulations for said District, particularly building regulation 167*a*, above quoted.

8.

Because the Court of Appeals erroneously decided that the said Zoning Act, so-called, on March 1, 1920, the date of the approval of said Zoning Act, repealed the certain Acts of Congress, 20 Stat. at L. p. 131, 20 Stat. at L. p. 868, 27 Stat. at L. p. 394; authorizing and empowering the Commissioners of the District of Columbia to enact building regulations for said District.

9.

Because the said decision and judgment of the Court of Appeals denied the authority or power or duty of the Commissioners of the District of Columbia to enact, and said Court declined to give effect to, section 21 of the Building Regulations of the District of Columbia, enacted by said Commissioners pursuant to said Acts of Congress (20 Stat. at L. p. 131; 20 Stat. at L. p. 868; 27 Stat. at L. p. 394), which said section is as follows:

"Applications for (building) permits shall be made in writing by the owner and submitted in person, or be signed by the owner and witnessed by his builder, architect, or authorized agent, or signed with power of attorney for owner, or by proper officer or member of a corporation, company of firm * * *"

10.

Because the decision and judgment of the Court of Appeals involves the construction or application of article 1, section 8,
30 paragraph 17 of the Constitution of the United States.

11.

Because the Court of Appeals erred in holding that the Supreme Court of the District of Columbia, and that said Court of Appeals had jurisdiction of the subject matter set forth in the petition of Mollie Schwartz, relator, because said petition fails to show that said relator had title to and was the owner of the real estate mentioned in said petition at the time application was made by her for the permit applied for, or at the time her petition was filed in the trial court.

Wherefore, for these and other manifest errors appearing in the record, said plaintiffs in error pray that the judgment of the Court of Appeals of the District of Columbia, be reversed and set aside and held for naught and that judgment be rendered in favor of the said plaintiffs in error.

F. H. STEPHENS,
Corporation Counsel for the District of Columbia, Attorney for Plaintiffs in Error, Appellees in the Court of Appeals.

31 [Endorsed:] In the Court of Appeals of the District of Columbia. No. 3450. No. 19, Special Calendar. Mollie Schwartz, appellant, vs. Louis Brownlow, Charles W. Kutz, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, appellees. Assignment of errors. Court of Appeals, District of Columbia. Filed June 14, 1921. Henry W. Hodges, clerk.

32 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 31 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Mollie Schwartz, Appellant, vs. Louis Brownlow, Charles W. Kutz, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, No. 3450, January Term, 1921, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 14th day of June, A. D. 1921.

[Seal of Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 28,314. District of Columbia Court of Appeals. Term No. 359. Louis Brownlow and Charles W. Kutz, Commissioners of the District of Columbia, and John P. Healy, Inspector of Buildings of the District of Columbia, plaintiff in error, vs. Mollie Schwartz. Filed June 15th, 1921. File No. 28,314.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 96.

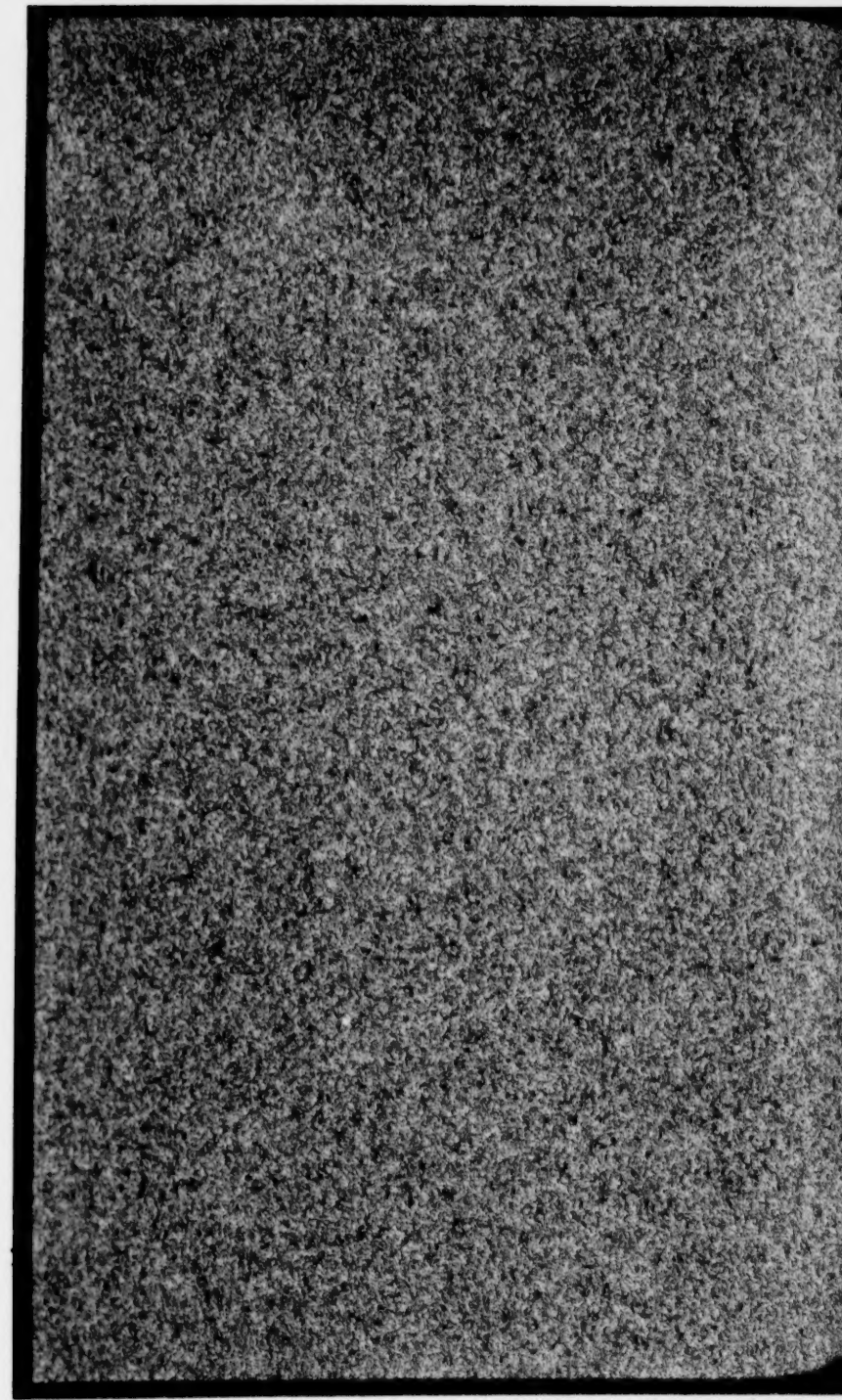
LOUIS BROWNLOW, CHARLES W. KUTZ, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND JOHN P. HEALY, INSPECTOR OF BUILDINGS, PLAINTIFFS IN ERROR,

vs.

MOLLIE SCHWARTZ, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFFS IN ERROR.

F. H. STEPHENS,
Corporation Counsel,
ROBERT L. WILLIAMS,
Assistant Corporation Counsel,
Attorneys for Plaintiffs in Error.



INDEX.

	Page.
Appointment of Commissioners, D. C., act of June 11, 1878	8
Article 1, section 8, paragraph 17, Constitution of U. S	8
Commissioners improperly named parties defendant	13
Issuance of permit not ground for dismissal of writ	16
Judicial Code, section 250	7
Points in support of writ of error	7
Section 21, Building Regulations, D. C	3
Section 167*a*, Building Regulations, D. C	3
Statement of the case	1
Waiver of errors not implied	17
Zoning act	20

AUTHORITIES AND CITATIONS.

Burrows vs. Meckler, 22 Fla., 574; 1 Am. St. Rep., 218	18
Clayton vs. Utah Territory, 132 U. S., 632-636-637	10
County Commissioners of Polk County vs. Johnson, 21 Fla., 578	18
County of Dakota vs. Glidden, 113 U. S., 222	18
Cullen vs. Latimer, 4 Texas, 329	12
Cusack County vs. Chicago, 242 U. S., 530	12
Farnsworth vs. Boston, 121 Mass., 173	12
First National Bank vs. Williams, 252 U. S., 504-512	10
Hoogendoon vs. Daniel, 202 Fed., 432 (120 C. C. A., 537)	18
Lynch vs. U. S., 137 U. S., 280-285	10
McLean vs. Denver & R. G. R. R. Co., 203 U. S., 38-47	9
Morriss vs. Garland, 78 Va., 235	18
O'Hara vs. McConnell, 93 U. S., 154	18
Plymouth Coal Co. vs. Pa., 232 U. S., 53	12
Roth vs. D. C., 18 Appeals, 547	17
Seale vs. Doane, 17 Cal., 477	12
Smoot vs. Heyl, 227 U. S., 518	10
State vs. Albright, 11 N. D., 26	18
Tyler vs. Judges of Registration, 179 U. S., 405	12
U. S. ex rel. Strasburger vs. D. C., 5 Mackey, 389-391	14
Walker vs. Savern, 41 Fla., 220	18
Warner Bros. Co. vs. Freud, 131 Cal., 644	18
Wynder vs. Williams, 23 Texas, 601, 603	11, 12

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 95.

OUIS BROWNLOW, CHARLES W. KUTZ, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND JOHN P. HEALY, INSPECTOR OF BUILDINGS, PLAINTIFFS IN ERROR,

vs.

MOLLIE SCHWARTZ, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFFS IN ERROR.

Statement of the Case.

This case is pending in this court on writ of error allowed y a Justice of this court on June 13, 1921 (Rec., p. 26), o review a judgment of the Court of Appeals of the District f Columbia (Rec., pp. 18-20, 21) in a cause entitled Mollie chwartz, appellant, *vs.* Louis Brownlow, Charles W. Kutz, ommissioners of the District of Columbia, and John P. Iealy, Inspector of Buildings of the District of Columbia,

appellees, awarding the writ of mandamus against *said Commissioners* and the Building Inspector, compelling them to issue a building permit to said Mollie Schwartz, to construct a drug store on a vacant lot in the residential section of the city of Washington, District of Columbia, the said lot adjoining residence No. 2604 Connecticut avenue N. W. The judgment of the Court of Appeals reversed the judgment of the trial court, the Supreme Court of the District of Columbia (Rec., pp. 18-20, 21).

At the time of the hearing of said cause in the Court of Appeals Louis Brownlow and Charles W. Kutz were the Commissioners of the District of Columbia, and the said John P. Healy was and is now the Inspector of Buildings of said District.

In April, 1920, and prior to April 30, 1920, the defendant in error, contemplating the purchase of the private residence known as No. 2604 Connecticut avenue northwest, and the vacant lot next adjoining it on the north, inquired of the Building Inspector of the District of Columbia as to whether or not there was any regulation or restriction as to the building of a drug store on said vacant lot, and was advised that there was no restriction against such use of the lot; and thereupon respondent, on April 30, 1920, *signed a contract to purchase said property*. Respondent then employed an architect to prepare plans for the drug store she proposed to erect, which plans were, on May 26, 1920, filed with the Inspector of Buildings, together with an application for permit to erect the drug-store building on said vacant lot. The Building Inspector refused, however, to issue the permit for the erection of the building to be used as a drug store by reason of the failure of the relator to comply with said building reg-

ulations. It was conceded by the relator that she did not comply with the requirements of regulation 167*a* of the building regulations of the District of Columbia, adopted May 24, 1920, which is as follows:

> "On a residence street where there is no property on the same block occupied and used for business purposes, no permit for the establishment or conduct of a business of any character, retail or wholesale, shall be granted until there shall be filed the written consents of the owners of three-fourths of the property within 200 feet of the site of the proposed establishment."

The Building Inspector refused, however, to issue the permit for the erection of the building to be used as a drug store by reason of the failure of the relator to comply with said building regulation and because defendant in error had not complied with section 21 of the building regulations, also then in force, and as follows:

> "Applications for (building) permits shall be made in writing by the owner and submitted in person, or be signed by the owner and submitted in person, or to be signed by the owner and witnessed by his builder, architect, or authorized agent, or signed with power of attorney for owner, or by proper officer or member of a corporation, company, or firm."
>
> (Rec., p. 12.)

The defendant in error then filed her petition for writ of mandamus in the Supreme Court of the District of Columbia, naming the plaintiffs in error here as defendants (Rec., p. 1), and thereupon a rule to show cause was issued under date of June 9, 1920 (Rec., p. 7). On June 11, 1920, the

plaintiffs in error herein filed their return to the rule to show cause, making that return also an answer to the petition for writ of mandamus (Rec., pp. 7, 8, 9). This answer was demurred to (Rec., p. 10) and on the 25th of June, 1920, the plaintiffs in error herein amended their return to the petition (Rec., p. 11), setting forth by that amendment that since the filing of their original answer they had been informed and believed that the petitioner for the writ of mandamus did not at the time of filing that petition file same in her own right, but in behalf of another, who was therefore the real party in interest; that the petitioner for the writ of mandamus was at the time of filing her petition interested in the property only to the extent that on or about the 30th day of April, 1920, she had signed a contract for the purchase of the property in question, that she had no title thereto, and that it was her purpose, should she ever acquire title thereto, to transfer the same to the real purchaser, one Simon Spigel.

On the same day leave to file the intervening petition of Mabel H. Simon was granted (Rec., pp. 12, 13), which petition set forth that said Mabel H. Simon was the owner of property in the same block as the property concerning which the building permit was sought, and further setting forth that if the proposed store building was permitted to be erected the same would constitute a nuisance and detriment and a source of special annoyance to her and her property and permanently depreciate its value. The intervening petitioner also set forth that the petitioner for the writ of mandamus had no title to the property at the time of filing her petition and did not have any such title at the time of the filing of the intervening petition on June 25, 1920, but

that the petitioner for the writ of mandamus intended to have the title to the property taken by one Simon Spigel.

Thereafter, on July 6, 1920, the demurrer to the answer to the petition for the writ of mandamus was overruled, the rule to show cause discharged, and the petition dismissed, from which ruling of the court an appeal to the Court of Appeals was duly noted (Rec., p. 14).

The Court of Appeals reversed the judgment of the lower court and remanded the cause with directions to issue the writ as prayed (Rec., p. 20), the opinion of the Court of Appeals appearing in full in the record (pp. 18, 19, 20). Plaintiffs in error filed in the Court of Appeals of the District of Columbia their motion for rehearing (Rec., pp. 20), which was denied (Rec., pp. 24), and thereafter, on the 13th day of June, 1921, this court, by Mr. Associate Justice Oliver Wendell Holmes, allowed this writ of error to the Court of Appeals of the District of Columbia.

It further appears by the affidavit of John P. Healy, Inspector of Buildings, one of the plaintiffs in error, filed herein, that on June 2, 1921—eleven days before the writ of error was allowed (Rec., p. 26)—Mollie Schwartz, defendant in error, conveyed the real estate mentioned in these proceedings, by deed in fee, to Simon Spigel and Sarah Spigel, as joint tenants, the deed being recorded June 9, 1921, among the land records of this District. A certified copy of the deed is attached to his affidavit.

On the 14th of March, 1921, after the Court of Appeals had reversed the order of the trial court and directed the issuance of the building permit, the defendant in error made demand upon John P. Healy, Building Inspector of the District of Columbia and one of the plaintiffs in error, to

issue the building permit in compliance with the judgment of the Court of Appeals of the District of Columbia, and said Building Inspector, believing it incumbent upon him to respect the command of the court and to avoid even the appearance of disobeying the court, did issue a building permit in the form set forth on page 15 of the "Motion of respondent to dismiss," which permit, however, contained the following condition: "These premises cannot be used or occupied until certificate of occupancy is obtained from the Inspector of Buildings in conformity with the Zoning Regulations" (this condition was annexed in order to conform to section 8 of the Act of Congress approved March 1, 1920, commonly called the "Zoning Act," which provides:

> "SEC. 8. That it shall be unlawful to use or permit the use of any building or premises or part thereof hereafter created, erected, changed or converted wholly or partly in its use or structure until a certificate of occupancy shall have been issued by authority of said Zoning Commission."

It is respectfully submitted that—

The Court of Appeals, in reversing the trial court, and in directing the writ of mandamus to issue against the Commissioners and the Building Inspector, erroneously denied the power and authority of the Commissioners of the District of Columbia to enact building regulation 167*a* (pp. 18, 19); and the Court of Appeals also erroneously decided that the said Commissioners did not have the power to enact said Building Regulation 167*a* for the reason, as assigned by the court, that section 167*a* is in direct conflict with the act of Congress of March 1, 1920 (Public No. 153, 66th Congress, H. R. 6863, Stat. at Large, page —), entitled

"An act to regulate the height, area, and use of buildings in the District of Columbia, and to create a Zoning Commission, and for other purposes," commonly known as the "Zoning Act" (see Appendix for copy of said act); and the court declined to give effect to section 21 of said Regulations (Rec., pp. 20, 23).

Points in Support of Writ of Error.

Section 250 of the Judicial Code (act of March 3, 1911, 36 Stat. at Large, 1087, c. 231; see page 465 of the Code of the District of Columbia, for section 250 of the Judicial Code) provides:

> "Sec. 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases: * * *
>
> "First. In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said Supreme Court, then the question of jurisdiction alone shall be certified to said Supreme Court for decision.
>
> * * * * * * *
>
> "Third. In cases involving the construction or application of the Constitution of the United States.
>
> * * * * * * *
>
> "Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

Article 1, section 8, paragraph 17 of the Constitution of the United States provides:

> "The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, and arsenals, dockyards, and other needful buildings.

The Court of Appeals held that Building Regulation 167*a* was void, and it declined to give effect to section 21, of said Regulations (Rec., pp. 18-20, 21, 22), both of which Regulations were enacted by the Commissioners, one of whom is the Engineer Commissioner, the latter deriving his authority by designation of the President of the United States.

By the act of June 11, 1878, 20 Stats. at Large, 103 (being section 15, chapter 19, of the Compiled Statutes of the District of Columbia by Abert, page 199), it is provided:

> "SEC. 15. The President of the United States, by and with the advice and consent of the Senate, is hereby authorized to appoint two persons, who, *with an officer of the Corps of Engineers of the United States Army*, whose lineal rank shall be above that of Captain, shall be Commissioners of the District of Columbia, and who, from and after July first, eighteen hundred and seventy-eight, shall exercise all the powers and authority now vested in the Commissioners of said District, except as are hereinafter

limited or provided, and shall be subject to all restrictions and limitations and duties which are now imposed upon said Commissioners."

By section 16 it provided:

"The Commissioner, who shall be an officer detailed, from time to time, from the Corps of Engineers, by the President, for this duty, shall not be required to perform any other."

By the enactment by the Commissioners of the Regulations, the construction of which is involved in the instant case, there is drawn in question the validity of an authority exercised under the United States, within the meaning of the fifth clause of section 250 of the Judicial Code. McLean *vs.* Denver & Rio Grande R. R. Co., 203 U. S., 38, 47, in which the Court held:

"The right to legislate in the Territories being conferred under constitutional authority, by Congress, the passage of a territorial law is the exercise of an authority exercised under the United States, and the validity of such authority is involved where the right of the legislature to pass an act is challenged; and, in such a case, if any sum or value is in dispute, an appeal lies to this Court from the Supreme Court of a Territory under section 2 of the act of March 3, 1885, 23 Stat., 443, even though the sum or value be less than $5,000." (By reference to page 47 of the decision referred to, it will be seen that section 2 of the act of March 3, 1885, allowed an appeal in cases wherein were involved the validity of any authority exercised under the United States—the same as the fifth clause of the Judicial Code.)

In further support of the writ of error under the fifth clause of the Judicial Code, we cite Clayton *vs.* Utah Territory, 132 U. S., 632, 636, 637; First National Bank *vs.* Williams, 252 U. S., 504 (see page 512); Lynch *vs.* U. S., 137 U. S., 280, 285, in which the court said, at page 285:

> "The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."

The jurisdiction of this court in the instant case is settled by the case of Smoot *vs.* Heyl, 227 U. S., 518 (affirming 34 App. D. C., 480), involving the validity of a Building Regulation promulgated by the Commissioners of the District of Columbia. The court decided it had jurisdiction under section 250 of the Judicial Code of 1911, there being involved under the facts of the case the construction of the act of 1878 authorizing the Commissioners of the District to make Building Regulations and what is a party-wall under such Regulations; it being also held that it is sufficient if the validity of the authority is drawn in question irrespective of the conclusion reached by the court below. The court says (p. 522):

> "As the appellees challenged the validity of the Regulation if it applied to their property as was insisted by the appellant, the case was one in which there was drawn in question the validity of an authority exercised under the United States."

By the decision and judgment of the Court of Appeals, in holding that the Building Regulation, passed May 24,

1920, is in direct conflict with the act of Congress passed March 1, 1920, creating a "Zoning Commission," there is drawn in question the validity of an authority exercised by the Commissioners of the District of Columbia under the acts of Congress of the United States, within the meaning of the fifth clause of the Judicial Code.

There is drawn in question the existence or scope of power or duty by officers of the United States, namely, the three Commissioners, one of whom is the Engineer Commissioner.

The Building Regulations, involved in the instant case, enacted by the Commissioners are to be considered the same as though they had been enacted by Congress, by reason of the provisions of the acts of Congress authorizing the Commissioners to enact Building Regulations. Said acts of Congress giving said authority were passed, of course, under article 1, section 8, paragraph 17, of the Constitution.

The petition of the relator is manifestly insufficient because it shows no title or right in the plaintiff to sue. The petition fails to show ownership in the plaintiff. This defect was called to the attention of the trial court (Rec., p. 11) as well as Building Regulation 21, requiring applications for permits by the *owner* or authorized agent of the *owner* (Rec., p. 12), and also called to the attention of the Court of Appeals (Rec., p. 21). The failure of the *owner*, or by his authorized agent, to make the application for the permit is enough to disentitle the relator to the writ of mandamus. (See Winder *vs.* Williams, 23 Texas, 601, 603.) All persons interested in the case must be included in the rule to show cause in mandamus, and, therefore, where application is made to compel a survey for the issue of a patent all persons who, to the knowledge of the applicant,

claim property in the land should be joined as defendants (Cullen *vs.* Latimer, 4 Texas, 329). Where the title to real property may be affected by proceedings for a mandamus, all persons having or claiming rights therein must be joined as respondents (Seale *vs.* Doane, 17 Calif., 477; Farnsworth *vs.* Boston, 121 Mass., 173; Cullen *vs.* Latimer, 4 Texas, 329; Winder *vs.* Williams, 23 Texas, 601, 603).

All that the petitioner alleges in her petition relative to the property is that she has entered into an agreement to purchase the land, not that the contract to purchase was consummated prior to the application for permit to erect the building or prior to the filing of the original petition for mandamus.

It appears upon the face of the petition itself that the relator has not been injured by the operation of the Building Regulations, and the rule is that "He who has not been injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or property" (Cusack Co. *vs.* City of Chicago, 242 U. S., 530, citing Tyler *vs.* Judges of Registration, 179 U. S., 405; Plymouth Coal Co. *vs.* Pennsylvania, 232 U. S., 53).

By reason of the foregoing, the trial court had no jurisdiction of the subject-matter within the meaning of the first clause of section 250 of the Judicial Code.

The Assignment of Errors is contained on pages 27-30 of the Transcript of Record.

II.

The Relator Improperly Named Commissioners Parties Defendant.

The defendant in error claims that, in view of the fact that Commissioner Brownlow has ceased to be a Commissioner, and as there were changes in the personnel of the Commissioners and no substitution of parties has been made, the writ of error should be dismissed.

At the time the original petition was filed, and during the pendency of the proceedings, and until recently, there were only two Commissioners of the District, the third one not having been appointed. The Commissioners were improperly named as defendants in this case. There is no statute authorizing or empowering the Commissioners to issue permits for the erection of buildings in the District of Columbia. The duty to issue permits is not laid upon them, and counsel for the defendant in error cites no case upholding the theory of the pleader, in naming the then Commissioners as codefendants with the Inspector of Buildings. The original petition, naming the Commissioners as parties, is improper. The petition appears, also, to be improperly entitled, in that the petitioner brings the proceeding, not upon the relation of the United States, but entirely in her own name. The prayer of the petition (Rec., p. 6) is:

> "That a writ of mandamus may issue out of this honorable court, directed to the *relators* and each of them, requiring them to appear in this court and answer this petition, and show cause, if any they have, why a writ of mandamus should not be issued

> against them, requiring them to issue to your petitioner a permit to build a building for business purposes on the vacant lot purchased by her, as pleaded in this petition."

Then follows the general prayer for relief.

It has already been pointed out (see affidavit of Healy) that by sections 2, 18, and 21 of the Building Regulations, enacted by the Commissioners under authority of acts of Congress, which are deemed the same as acts of Congress, the duty to issue building permits is laid exclusively upon the Inspector of Buildings, and it is also provided by section 2 that that official "shall have no discretionary power to modify any of these regulations."

The case of U. S. *ex rel.* Strasburger *vs.* The Commissioners of the District of Columbia, 5 Mackey (1887, D. C. Reports), 389, was a mandamus suit brought to compel the Commissioners to issue to plaintiff a permit to repair and reconstruct a building in the District, and also to transfer a license for a theater. The relator had failed to comply with a local regulation which required, as a condition precedent to the issue of a permit, that a majority of the residents in the square, and of those in the opposite square, fronting the designated place, should signify their approbation of the application. The Regulation was held valid.

Speaking to the point that the Commissioners were not the proper defendants, the court, at page 391, said:

> "An objection was made in argument on the part of the defendant to the form of this application, which it is not (sic) necessary to consider; but it is proper that we should notice a substantial error in the procedure which would prevent us, in any event, from granting this application in its present form.

> "By the regulations and laws governing this District there is no question that the only person authorized to issue a building permit is the inspector of buildings; and he was the official to whom the application was made in the first instance. The Commissioners have no function of that sort. It is equally clear that the only officer authorized to issue a license is the register." [In the instant case, the only proper officers to issue an occupancy permit are the members of the Zoning Commission.]

Continuing, in the Strasburger case, the court said (p. 391):

> "Here, then, is an application, by a proceeding for a *mandamus*, which (except where it has been changed by statute, and there has been no change here) is one regulated with great strictness at the common law, calling on this court to order the Commissioners of the District to perform two distinct acts, neither of which they have legally the power to perform.
>
> "It is not necessary to cite further authority as to the law upon this point than the decision of the Supreme Court of the United States in *Ex parte* Rowland, 104 U. S., 604."

In the Rowland case, this court said that certain officers cannot be required by *mandamus* to compel another officer to do his duty, if, without their intervention, the moving party can himself accomplish the same result.

This court quoted approvingly, from Reg. *v.* Mayor of Derby, 2 Salk., 436: "It is absurd that the writ should be directed to one person to command another."

III.

Issuance of Permit is Not Ground for Dismissal of Writ.

The defendant in error further contends that the writ of error should be dismissed because a permit was issued after the decision of the Court of Appeals. The affidavit of the Inspector of Buildings sets out that on March 14, 1921, after the Court of Appeals reversed the order of the trial court, and directed the issuance of the permit, and upon demand of the relator, he, believing that it was incumbent upon him to comply with the decision of the court, and to avoid even the appearance of disobeying the order and judgment of the court, issued the permit, in the form set forth on page 15 of the Motion to Dismiss. The writ of error was allowed on June 13, 1921, within the statutory period allowed for such an application.

The Zoning Commission is not a party to this cause. By section 8 of the "Zoning Act" it is provided that it shall be unlawful to use or permit the use of any building or premises created after the passage of the Act, erected, changed or converted wholly or partly in its use or structure until a certificate of occupancy shall have been issued by authority of the Zoning Commission, and section 9 of that Act provides the penalty. Therefore, the Inspector of Buildings included in the permit the condition, "These premises cannot be used or occupied until a certificate of occupancy is obtained from the Inspector of Buildings."

The writ of error was allowed June 13, 1921 (Rec., p. 26), citation was served upon counsel for defendant in error and writ of error was exhibited to him on June 14, 1921 (Rec.,

pp. 26-27). Under section 177, D. C. Code, it is unnecessary for any officer of the United States or the District of Columbia to give bond or enter into an undertaking to perfect any appeal or to obtain any injunction or other writ, process, or order in or of any court in the District of Columbia for which a bond or undertaking is now or may be hereafter required by law or rule of court. Therefore, on June 13, 1921, the allowance of the writ of error operated as a supersedeas (Roth *v.* D. C., 18 App., 547). Nevertheless, on June 15, 1921, after service of citation on the day previous, the defendant in error obtained a peremptory writ of mandamus from the trial court, certified copy of which is annexed to the affidavit of John P. Healy, filed herein. When the attention of the trial court was called to the situation, an order was entered quashing the writ of mandamus entered upon the mandate of the Court of Appeals, and the latter court recalled the mandate. (See exhibit to affidavit to Healy.)

The defendant in error evidently did not believe on June 15, 1921, that the issuance of the permit, in its limited form, gave to defendant in error the relief sought by her.

We contend that there is no implied waiver of errors, or waiver of the right to writ of error. We respectfully submit that if Building Regulation 167*a* is valid, a matter involving the merits of this case, the Inspector of Buildings, an official of the District of Columbia, representing the people of this community who have an interest in the subject-matter, could not waive the Regulation, nor, indeed, any of the Building Regulations. They have the same force and effect as congressional enactments. Section 2 of the Building Regulations provides that the Inspector of Buildings shall have no

discretionary power to modify any regulation. Section 182 provides punishment for a violation of any of the regulations.

Writ of error or appeal will not be dismissed on assumption that release of errors was implied from fact that money or property had changed hands by force of the judgment or decree; if judgment be reversed, court should restore parties to their rights.

In Hoogendoon *v.* Daniel, 202 Fed., 432 (120 C. C. A., 537), payment of judgment not ground for dismissing appeal therefrom; Walker *v.* Savern, 41 Fla., 220, holding execution of decree for sale by master making sale and executing conveyance thereunder does not prevent reversal on appeal taken after sale; State *v.* Albright, 11 N. D., 26, holding whereon mandate to issue warrant for six hundred and thirty-five dollars, warrant for less sum was issued, issuance of such warrant would not prevent appeal from order granting mandate; County Commissioners of Polk County *v.* Johnson, 21 Fla., 578, performance as required by mandamus did not bar appeal; Burrows *v.* Meckler, 22 Fla., 574; 1 Am. St. Rep., 218, payment on execution did not bar appeal from the judgment.

Warner Bros. Co. *v.* Freud, 131 Cal., 644, holding appeal will not be dismissed unless payment was by way of compromise.

O'Hara *v.* McConnell, 93 U. S., 154, holding that deed made by order of court will not affect right of appeal; Morriss *v.* Garland, 78 Va., 235, holding acceptance by plaintiff of satisfaction of decree not a waiver of right of appeal. See, also, County of Dakota *v.* Glidden, 113 U. S., 222.

IV.

Conveyance in Fee by Defendant in Error of Subject-matter.

It appears by the certified copy of deed of defendant in error, dated June 2, 1921, recorded June 9, 1921, the defendant conveyed to Simon and Sarah Spigel the property mentioned in these proceedings, neither of whom is a party to this cause.

If the case is moot it appears that that result has been produced by the action of the defendant in error. In that aspect of the case, the rule announced in Heitmuller *v.* Stokes, decided May 16, 1921, by this court, would apply. In that case, while the cause was pending in this court, the owner of the property conveyed it, the suit being a landlord-and-tenant one for possession, and this court reversed the judgment of the Court of Appeals, with directions to remand the case to the Supreme Court of the District for dismissal of the complaint.

Respectfully submitted,

FRANK H. STEPHENS,
Corporation Counsel,
ROBERT L. WILLIAMS,
Asst. Corporation Counsel,
Counsel for Plt'fs in Error.

APPENDIX.

[Public—No. 153—66th Congress.]

[H. R. 6863.]

An act to regulate the height, area, and use of buildings in the District of Columbia and to create a Zoning Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to protect the public health, secure the public safety, and to protect property in the District of Columbia there is hereby created a Zoning Commission, which shall consist of the Commissioners of the District of Columbia, the officer in charge of public buildings and grounds of the District of Columbia, and the Superintendent of the United States Capitol Building and Grounds, which said commission shall have all the powers and perform all the duties hereinafter specified and shall serve without additional compensation. Such employees of the Government of the District of Columbia as may be necessary to carry out the purposes of this act shall be assigned to such duty by the Commissioners of the District of Columbia without additional compensation.

There is hereby authorized for the expenses of said commission, including the employment of expert services and all incidental and contingent expenses, a sum not to exceed $5,000, payable one-half out of any money in the United States Treasury not otherwise appropriated and the other half out of the revenues of the District of Columbia.

SEC. 2. That within six months after the passage of this act and after public notice and hearing as hereinafter pro-

vided, the said commission shall divide the District of Columbia into certain districts, to be known, respectively, as height, area, and use districts, and shall adopt regulations specifying the height and area of buildings thereafter to be erected or altered therein and the purposes for which buildings and premises therein may be used: *Provided,* That such regulations may differ in the various districts: *Provided further,* That the permissible height of buildings in any district shall not exceed the maximum height of buildings now authorized upon any street in any part of that district by the act of Congress approved June 1, 1910, and amendments thereto, regulating the height of buildings in the District of Columbia: *And provided further,* That no such districts shall be established, nor shall any regulations therefor be adopted, nor shall the height, area, or use of buildings to be erected therein be prescribed until said commission has afforded persons interested an opportunity to be heard at a public hearing as hereinafter provided: *And provided further,* That in residence districts the usual accessories of a residence located on the same lot including the office of a physician, dentist, or other person, and including a private garage containing space for not more than four automobiles, shall not be prohibited.

SEC. 3. That wherever, under the provision of this act, it is required that a public hearing shall be held, notice of the time and place of such hearing shall be published for not less than ten consecutive days in one or more newspapers of general circulation printed and published in the District of Columbia; and such public hearing may be adjourned from time to time: *Provided,* That if the time and place of the adjourned meeting is publicly announced when the adjourn-

ment is had, no further notice of such adjourned meeting need be published.

SEC. 4. That after the public hearings herein provided for shall have been concluded, said commission shall definitely determine the number and boundaries of the districts which it is hereby authorized and directed to establish, and shall specify the height and area of the buildings which may thereafter be erected therein, and shall prescribe the purposes for which such buildings thereafter erected may or may not be used. Said districts so established shall not be changed except on order of said commission after public hearing. Said commission may initiate such changes, or they may be initiated upon the petition of the owners affected. Where the proposed change is to add a contiguous area to a use, height, or area district, the owners of at least 50 per centum of the street frontage proposed to be changed must join in the petition: *Provided*, That if the frontage proposed to be changed is not a contiguous area, the owners of at least 50 per centum of a frontage within the area not less than three blocks in length must join in such petition before it may be considered by said commission. No such change shall be made, either by said commission on its own motion or upon such petition, except with the unanimous vote of said commission, if the owners of at least 20 per centum of the frontage proposed to be changed protest against such change.

SEC. 5. That said commission is authorized and empowered to make such orders and adopt such regulations not inconsistent with law as may be necessary to accomplish the purposes and carry into effect the provisions of this act:

Provided, That no order or regulation so adopted shall require any change in the plans, construction, or designated use of (*a*) a building for which a permit shall have been issued, or plans for which shall be on file with the inspector of buildings of the District of Columbia at the time the orders or regulations authorized under this act are promulgated; or (*b*) a permit for the erection of which shall be issued within thirty days after promulgation of the orders or regulations authorized or adopted under this act and the construction of which in either of the above cases shall have been diligently prosecuted within a year from the date of such permit and the ground story framework of which, including the second tier of beams, shall have been completed within said year, and which entire building shall be completed according to such plans within two years of the date of the promulgation of such orders or regulations; or (*c*) prevent the restoration of a building partially destroyed by fire, explosion, act of God, or the public enemy, or prevent the continuance of the use of such building or part thereof as such use existed at the time of such partial destruction, or prevent a change of such existing use except under the limitations provided herein in relation to existing buildings and premises: *Provided further,* That no frame building that has been damaged by fire or otherwise more than one-half of its original value shall be restored within the fire limits as provided by the building regulations of the District of Columbia; or (*d*) prevent the restoration of a wall declared unsafe by the inspector of buildings of the District or by a board of survey appointed in accordance with any existing law or regulation.

SEC. 6. That any lawful use of a building or premises existing at the time of the adoption of orders and regulations made under the authority of this act may be continued, although such use does not conform with the provisions hereof or with the provisions of such orders and regulations; and such use may be extended throughout the building, provided no structural alteration, except those required by law or regulation, is made therein and no new building is erected. Where the boundary line of any use district divides a lot in a single ownership at the time of the adoption of orders and regulations under the authority of this act, the commission may permit a use authorized on either portion of such lot to extend to the entire lot, but not more than twenty-five feet beyond the boundary line of the use district.

SEC. 7. That maps of the districts established by said commission and copies of all orders and regulations as to the height and area of buildings to be erected therein and as to the uses to which such buildings may be lawfully devoted, and copies of all other official orders and regulations of the commission shall be filed in the office of the Engineer Commissioner of the District of Columbia. Copies of all orders and regulations shall be published in one or more newspapers printed in the District of Columbia for the information of all concerned.

SEC. 8. That it shall be unlawful to use or permit the use of any building or premises or part thereof hereafter created, erected, changed, or converted wholly or partly in its use or structure until a certificate of occupancy shall have been issued by authority of said zoning commission.

SEC. 9. That buildings erected, altered, or raised, or converted in violation of any of the provisions of this act or the orders and regulations made under the authority thereof are hereby declared to be common nuisances; and the owner or person in charge of or maintaining any such buildings, upon conviction on information filed in the police court of the District of Columbia by the corporation counsel or any of his assistants in the name of said District, and which court is hereby authorized to hear and determine such cases, shall be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not more than $100 per day for each and every day such nuisance shall be permitted to continue, and shall be required by said court to abate such nuisance. The corporation counsel of the District of Columbia may maintain an action in the Supreme Court of the District of Columbia in the name of the District of Columbia to abate and perpetually enjoin such nuisance.

SEC. 10. That the Commissioners of the District of Columbia shall enforce the provisions of this act and the orders and regulations adopted by said Zoning Commission under the authority thereof, and nothing herein contained shall be construed to limit the authority of the Commissioners of the District of Columbia to make municipal regulations as heretofore: *Provided,* That such regulations are not inconsistent with the provisions of this law and the orders and regulations made thereunder. In interpreting and applying the provisions of this act and of the orders and regulations made thereunder they shall be held to be the minimum requirements for the promotion of the public health, safety, comfort, convenience, and general welfare. This act shall not

abrogate or annul any easements, covenants, or other agreements between parties: *Provided, however,* That as to all future building construction or use of premises where this act or any orders or regulations adopted under the authority thereof impose a greater restriction upon the use of buildings or premises or upon height of building, or require larger open spaces than are imposed or required by existing law, regulations, or permits, or by such easements, covenants, or agreements, the provisions of this act and of the orders and regulations made thereunder shall control.

SEC. 11. That all laws or parts of laws and regulations in conflict with the provisions of this act are hereby repealed.

Approved March 1, 1920.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 95

LOUIS BROWNLOW, CHARLES W. KUTZ, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND JOHN P. HEALY, INSPECTOR OF BUILDINGS OF THE DISTRICT OF COLUMBIA, *Plaintiffs in Error,*

vs.

MOLLIE SCHWARTZ, *Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR.

W. GWYNN GARDINER,
Attorney for Defendant in Error.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 359.

LOUIS BROWNLOW, CHARLES W. KUTZ, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND JOHN P. HEALY, INSPECTOR OF BUILDINGS OF THE DISTRICT OF COLUMBIA, *Plaintiffs in Error,*

vs.

MOLLIE SCHWARTZ, *Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

On March 1, 1920, Congress passed an act entitled "An Act to Regulate the Height, Area, and Use of Buildings in the District of Columbia, and to Create a Zoning Commission, and for Other Purposes."

Section 11 of this Act provides:

> "That all laws or parts of laws and regulations in conflict with the provisions of this act are hereby repealed."

Section 2 of this act provides:

> "That within six months after the passage of this act and after public notice and hearing as hereinafter provided, the said commission shall divide the District of Columbia into certain districts, to be known, respectively, as height, area, and use districts, and shall adopt regulations specifying the height and area of buildings thereafter to be erected or altered therein and the purposes for which buildings and premises therein may be used; * * *"

Section 5 of this act provides:

> "That said commission is authorized and empowered to make such orders and adopt such regulations not inconsistent with law as may be necessary to accomplish the purposes and carry into effect the provisions of this act: *Provided,* That no order or regulation so adopted shall require any change in the plans, construction, or designated use of (a) a building for which a permit shall have been issued, or plans for which shall be on file with the inspector of buildings of the District of Columbia at the time the orders or regulations authorized under this act are promulgated; * * *"

In April, 1920, defendant in error was desirous of purchasing certain unimproved property in the District of Columbia with a view of improving said property with a building in which she proposed conducting a retail drug business (R. 2).

During the month of April, 1920, and before she purchased said property, her agent was advised by the Building Inspector's Office of the District of Columbia that there were no building regulations or restrictions

of any kind that would in any wise interfere with the construction of such a building on the vacant lot, if purchased by her. She further in the month of April made inquiry of the Surveyor's Office of the District of Columbia with reference to her rights to build, and was advised by the said Surveyor's Office that there were no restrictions or regulations of any character to prevent her constructing such a building as she desired on said property should she purchase.

On April 30, 1920, defendant in error purchased said property and paid for same the sum of Twenty-five Thousand Five Hundred Dollars ($25,500) (R., 2-3). Before signing the contract to purchase, however, and on said 30th day of April, 1920, she had her father and her real estate agent go to the Office of the Building Inspector for the second time to make inquiry as to her right to construct this building on said premises, and they were again advised that there were no obstacles in her way; that she would be entitled to a permit to construct the building, and after such advice was given her, she, on said date, signed the contract to purchase and purchased said property (R., 2).

Immediately upon the signing of the contract to purchase, she employed an architect to prepare plans and specifications to erect the building on said vacant lot, and on May 26, 1920, she filed with the Building Inspector of the District of Columbia an application asking for a permit to build a store house on said vacant lot at a cost to defendant in error of ($6,500) Six Thousand Five Hundred Dollars.

The permit was refused and on June 5, 1920, she was advised in writing by the Building Inspector that on May 24, 1920, two days before the application was filed, the Commissioners of the District of Columbia enacted

an amendment to the Building Regulations to be known as Section 167-A which regulation provided thus:

> "On a residence street where there is no property on the same block occupied and used for business purposes, no permit for the establishment or conduct of a business of any character, retail or wholesale, shall be granted until there shall be filed the written consent of the owners of three-fourths of the property within 200 feet of the site of the proposed establishment. * * *" (R., 5).

Without waiving any of her legal rights, but with a desire of obtaining the permit, if possible, defendant in error sought to obtain the signatures of the property owners to comply with such request of the Commissioners, but was unable to obtain their consent.

At this time, June 5, 1920, no public notice had been given or hearings had, as provided by Section 2 of the Act of Congress of March 1, 1920, which requires that public notice and hearings be had by the Commission before any action is taken by the Commission to put in force and operation the provisions of said Act.

On June 9, 1920, there still being no publication, as required by this Act, and no attempt by the Zoning commission, as created by said Act of March 1, 1920, to give notice or conduct public hearings, and the District Commissioners refusing permit, defendant in error filed her petition for a Writ of Mandamus in the Supreme Court of the District of Columbia, in which she sought to require the then Commissioners of the District of Columbia and the Building Inspector of the District of Columbia to issue the building permit to her, in accordance with the application then on file in the District Building (R., 1).

In her petition she sets forth the facts as stated above, and further challenges the right of the Commissioners to promulgate and adopt the proposed amendment to the Building Regulations as undertaken to be adopted by them on the 24th of May, 1920 (R., 1-7).

A rule was issued by the court on the 9th of June ordering the plaintiffs in error to appear on the 11th day of June at 10 o'clock and show cause, if any they had, why a Writ of Mandamus should not issue against them, as prayed for in the petition (R., 7).

On the 11th day of June, 1920, at 10 o'clock, plaintiffs in error all joined in an answer in which they admit the substantial facts, as pleaded by the defendant in error, but challenged the right of the defendant in error to have said permit granted her because of this attempted amendment to the Building Regulations, promulgated and adopted by the Commissioners on the 24th day of May, 1920 (R., 7-9).

The plaintiffs in error stated in their answer (R., 8) on the question of the refusal to grant the permit, thus:

> "Concerning the allegations of said paragraph, that said plans or specifications were in every respect in accordance with the building regulations and were in every respect acceptable to the Building Inspector's office and were correct in every particular, these respondents say that they cannot either admit or deny said allegations, but if material herein demand strict proof thereof, and further state concerning said allegations that no examination was made of said plans or specifications by the office of said Building Inspector, to determine whether the same were acceptable as alleged, or were correct and in compliance with the Building Regulations, for the reason that it appeared upon the face of said plans and specifications, and the application for permit to build in accordance

therewith, that said permit could not be granted because of the existence of the Building Regulations set out in paragraph seven of the petition herein, and therefore they deny that said plans and specifications were structurally approved as alleged. That as said Building Regulation was, at the time aforesaid, in full force and effect, the structural details concerning the building for which permit was sought to be obtained by petitioner were matters of no consequence to the office of the Building Inspector as the existence of said Building Regulation made it unlawful to issue said permit, regardless of the details of the plans and specifications aforesaid'' (R., 8).

On June 12, 1920, defendant in error demurred to the answer of plaintiffs in error, and gave notice for hearing said demurrer as of June 18, 1920, at 10 o'clock (R., 10).

After the hearing of said petition and the answers thereto and the demurrer filed to said answer, but before a decision by the court was rendered, and on to wit, the 25th day of June, 1920, plaintiffs in error sought to amend their petition by striking out some portions of their answer and alleging some facts, but this answer was not filed with leave of the court and was not verified by affidavit as required by Sec. 1275 of the Code of Laws of the District of Columbia (R., 11).

On the same day, however, June 25, 1920 (R., 12), by leave of the court first had and obtained, one Mabel H. Simon was allowed to file an intervening petition. In this intervening petition the claim was made that defendant in error should not have filed the suit because the deed conveying the property to her had not been recorded at the time of the institution of this suit (R., 14). Thereupon on July 2, 1920, with leave of the court

first had and obtained Kate E. Lloyd and Major Edward Lloyd intervened as petitioners, in which petition they pray for all of the relief asked for by the original petitioner.

On July 26, 1920, the trial justice entered an order in the case discharging the rule and dismissing the petition, from which an appeal was noted in open court by the defendant in error, and on the same day, the bond on appeal was approved and filed (R., 14).

The questions raised in the intervening petition were not presented to the Court of Appeals of the District of Columbia and they are not parties in this Court.

On February 7, 1921, the Court of Appeals of the District of Columbia rendered its decision in the case reversing the action of the trial justice (R., 18-20), and remanded the cause with instructions to issue the writ as prayed.

Thereafter, on February 27, 1921, and before the mandate of the Court of Appeals had issued to the lower court, the plaintiffs in error filed their petition in the Court of Appeals asking for a rehearing (R., 20-21).

On March 19, 1921, the motion for rehearing was denied (R., 24).

Before the decision of the Court of Appeals on the application for rehearing was rendered, and on, to wit, the 14th day of March, 1921, the then Commissioners of the District of Columbia issued a permit to defendant in error in accordance with her application filed with the plaintiffs in error on the 26th day of May, 1920. (See Exhibit No. 2, page 15 of "Motion of Respondents' to Dismiss.")

Under authority vested in defendant in error under the provisions of this permit issued to her on March

14, 1921, she constructed her building, all in accordance with the plans and specifications filed with the plaintiffs in error on May 26, 1920. This building was fully completed by the defendant in error (Pg. 2, "Motion of Respondent to Dismiss") on the 13th day of June, 1921.

On the 13th day of June, 1921, Mr. Associate Justice Holmes, of this Court, allowed a Writ of Error which brings the case to this Court (R., 24-25).

On the 31st day of August, 1921, defendant in error filed her motion to dismiss the Writ of Error, theretofore allowed by Mr. Associate Justice Holmes on the 13th day of June, 1921. On the 24th day of October, 1921, this Court acted upon said motion and continued the disposition of same until the argument on the merits.

ARGUMENT.

The Motion to Dismiss should be granted upon the grounds among others:

(1) That the question before the Court is moot.

(2) That the Commissioners of the District of Columbia, against whom this writ ran, are no longer Commissioners of the District of Columbia.

THE QUESTION BEFORE THE COURT IS MOOT.

Louis Brownlow was succeeded in office by Miss Mabel Boardman on September 25, 1920, and the vacancy existing in the Board at the time of the filing of the original petition was filled by J. Tilman Hendricks, who qualified as Commissioner of the District of Columbia on September 17, 1920. (Page 7, Motion to Dismiss.)

On the 14th of March, 1921, there was issued to de-

fendant in error the permit to construct the building in question and for which she had filed her petition. This action was taken by the then Commissioners and this permit was issued to her on March 14, 1921. (Pg. 15, Motion of Respondent to Dismiss.) On this date the Court of Appeals had not passed upon the motion of the plaintiffs in error for a rehearing. Its action thereon was not until March 19, 1921, all as is shown by respondent's Exhibit No. 1, as found on page 14, "Motion of Respondents to Dismiss."

Defendant in error upon receipt of the permit to build, constructed her building, and as shown by her sworn statement (page 8, "Motion to Dismiss"), the building was completed when this writ of error was allowed by a justice of this court.

The question is, therefore, a purely moot one.

This court has repeatedly said that it would not hear, consider, and decide moot cases.

In MILLS VS. GREEN, 159 U. S., 651-658, the Court on motion to dismiss upon the ground that:

> "There is now no actual controversy involving real and substantial rights between the parties to the record and no subject matter upon which the judgment of this court can operate."

stated:

> "We are of opinion that the appeal must be dismissed upon this ground, without considering any other question appearing on the record or discussed by counsel.
>
> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of

> law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence."

In HEITMULLER VS. STOKES, 256 U. S., 359-363, this court on May 16, 1921, in an opinion delivered by Mr. Justice Day in considering a motion to dismiss the appeal upon the ground that the question was a moot question, said:

> "As the action was brought to recover the possession of real estate, and as the defendant in error has, pending review in this court, sold it, we agree with the contention that the case has become moot. The plaintiff in error, so far as the record discloses, is in possession, and the defendant in error, having sold and conveyed the property, a judgment in his favor will not give him possession of the premises. It has been often held that this court will not decide moot cases."

We have just such a situatioon in this case, for the only grounds upon which the original petition was based was to require the then Commissioners of the District of Columbia to give the defendant in error a permit to construct this house. The permit was given and given before any writ was issued to the Commissioners directing it to be issued, and the defendant in error constructed the house before the writ of error was granted in this court, and, therefore, the question before this court is moot.

CONVEYANCE IN FEE BY DEFENDANT IN ERROR LIKEWISE MAKES THE CASE A MOOT ONE.

Counsel for plaintiffs in error make the claim in their brief that if this case is moot, then it was made so by the conveyance in fee of June 2, 1921, from defendant in error to other parties.

While it is true that such a conveyance was made, it must be borne in mind that the defendant in error, having obtained her permit under date of March 14, 1921, and completely constructed her house under the authority given her by the then District Commissioners, as provided by the terms of said permit, and the litigation having been determined and settled by the decision of the Court of Appeals, which decision was made final by its refusal to grant a rehearing under date of March 21, 1921, and this court having by its action refused a writ of certiorari in the case under date of the 1st day of June, 1921, and nothing further having been done, or so far as the defendant in error knew was being done by the plaintiffs in error, defendant in error sold, transferred, and conveyed the property in question under date of June 2, 1921, and this deed was recorded among the Land Records of the District of Columbia on the 9th of June, 1921. The action of this court in granting the writ of error was on the 13th day of June, 1921 (R., 25).

We, therefore, have this situation.

The plaintiffs in error are no longer interested in the controversy, since they have ceased to be officers of the District of Columbia.

The defendant in error has no interest in the property since it was conveyed by her before this writ was

granted and after final adjudication and disposition of this case in the Court of Appeals.

The owner of the property who was known to be the owner at the time this writ was granted and at the time this writ was applied for, has not in any wise been made a party to this proceeding.

We, therefore, have a situation where none of the parties before the court are in any wise interested in the subject matter of the suit.

Whether this court sustains the action of the Court of Appeals or finds error in the Court of Appeals' ruling, nevertheless, we submit, this court would not order the destruction of this property—the tearing down of this building—when it was built in accordance with law and under authority of the law.

Likewise, the decision of this court would not undertake to interfere with the rights of an innocent purchaser of property, who purchased the same and obtained a deed for same and recorded that deed among the Land Records of the District of Columbia, after the controversy had been settled. Thereafter this writ of error was granted.

We most respectfully submit that had the plaintiffs in error intended in good faith to have applied to this court for a writ of error they should not have granted the permit in the first place, and they should likewise have promptly applied to this court for the writ of error before the mandate of the Court of Appeals was delivered to the lower court.

The final action of the Court of Appeals was taken in this case on March 19, 1921, upon which date the motion for rehearing was denied by the Court of Appeals. On March 21, 1921, the mandate of the Court of Appeals issued in this case to the lower court, the writ of error in this case being granted on the 13th of June.

PLAINTIFFS IN ERROR, BROWNLOW AND KUTZ, ARE NOT NOW COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND THEREFORE THERE IS NO PROPER PERSON TO STAND IN JUDGMENT.

At the time that the original petition in this case was filed in the Supreme Court of the District of Columbia on the 9th day of June, 1920, plaintiffs in error, Louis Brownlow and Charles W. Kutz, were the only Commissioners of the District of Columbia, there being one vacancy in the Board of Commissioners. One of the plaintiffs in error, Louis Brownlow, was succeeded in office by Miss Mabel Boardman, who took her oath of office as Commissioner of the District of Columbia on the 25th of September, 1920. The vacancy on the Board was filled by the appointment of J. Tilman Hendricks, who took oath of office on the 17th of September, 1920, and thereafter, plaintiff in error, Charles W. Kutz, was succeeded in office by Col. Charles Keller.

The original relief prayed for in this case was for a writ of mandamus against these individual plaintiffs in error. They are no longer in office and there is no proper person to stand in judgment in the case.

This court had before it this question in PULLMAN CO. VS. NOTT, 243 U. S., 447-451, Mr. Justice Day in delivering the opinion of this court in this case on this question said:

> "It is now before us upon a motion of the defendant in error, by the Attorney General of the State, to dismiss the proceeding in this court upon the ground that there is no proper person defendant to stand in judgment in the action. It is averred, and is not disputed, that Knott, the defendant in error, is no longer Comptroller of the

> State of Florida, his term of office having expired on January 2, 1917, and that thereupon he retired from the office of Comptroller and has been succeeded by another, who is the duly commissioned and acting Comptroller of the State. * * * While it is true that the duty required concerns the State, the suit is against Knott as an individual, and he alone can be punished for the failure to obey an injunction, should one issue as prayed for in the bill. Whether the court below was right in refusing the injunction and dismissing the bill against Knott, is the question presented. In such cases, a long line of decisions in this court has settled that the action abates upon the expiration of the defendant's term of office, and cannot be revived against his successor in office, in the absence of a statute so providing."

Counsel for the plaintiffs in error seek to make the point in their brief that the Commissioners are not proper parties and in that manner seek to avoid the effect of these decisions.

The Commissioners of the District of Columbia are not only proper parties, but they are necessary parties in such a case as this.

The Court of Appeals of the District of Columbia in KERR VS. ROSS, 5 App. D. C., 241-256, in discussing the powers of the Commissioners of the District of Columbia in a mandamus case like this, as found on page 253 of this decision, said:

> "The legislative power in the District of Columbia is vested solely in Congress. The District itself is a municipal corporation, and its governing body of officers, the Commissioners, exercise powers, under the supreme control of Congress, analogous to those ordinarily delegated to the mayor and council of the municipal corporations organized generally under the laws of the States.

> "The principle of law is thoroughly well established, that powers entrusted to the governing bodies of municipal corporations, to be exercised, according to their discretion, for the public good, cannot be delegated by them in turn to other agents of their own creation, except where the power so to do is also conferred."

This court in METROPOLITAN R. R. CO. vs. DISTRICT OF COLUMBIA, 132 U. S., 1-13, in an opinion of this court delivered by Mr. Justice Bradley in discussing the powers and duties of the Commissioners of the District of Columbia, as found on page 7 of this report, laid down the principle that the Commissioners are the governing body having control of the affairs of the District of Columbia.

Under the Act of Congress of June 14, 1878, Congress by said act vested in the Commissioners the authority:

"To make and enforce such building regulations as they may deem advisable." It follows, therefore, that the Commissioners of the District of Columbia were not only proper, but necessary parties to this proceeding.

It will be shown by reference to briefs of council in the Court of Appeals of the District of Columbia that this position was not presented to the Court of Appeals by plaintiff in error. (See answer to petition for writ of certiorari, pp. 15-22.)

DEFENDANT IN ERROR ENTITLED TO HER PERMIT UNDER ZONING LAW ITSELF.

The Zoning Act or the Act of Congress of March 1, 1920, gave defendant in error the right to have this permit issued under the provision of Sec. 5 of the Act, which states thus:

"That said commission is authorized and empowered to make such orders and adopt such regulations not inconsistent with law as may be necessary to accomplish the purposes and carry into effect the provisions of this act: *Provided*, That no order or regulation so adopted shall require any change in the plans, construction, or designated use of (a) a building for which a permit shall have been issued, or plans for which shall be on file with the inspector of buildings of the District of Columbia at the time the orders or regulations authorized under this act are promulgated; or (b) a permit for the erection of which shall be issued within thirty days after the promulgation of the orders or regulations authorized or adopted under this act and the construction of which in either of the above cases shall have been diligently prosecuted within a year from the date of such permit and the ground story framework of which, including the second tier of beams, shall have been completed within said year, and which entire building shall be completed according to such plans within two years of the date of the promulgation of such orders or regulations; or (c) prevent the restoration of a building partially destroyed by fire, explosion, act of God, or the public enemy, or prevent the continuance of the use of such building or part thereof as such use existed at the time of such partial destruction or prevent a change of such existing use except under the limitations provided herein in relation to existing buildings and premises: *Provided further*, That no frame building that has been damaged by fire or otherwise more than one-half of its original value shall be restored within the fire limits as provided by the building regulations of the District of Columbia; or (d) prevent the restoration of a wall declared unsafe by the inspector of buildings of the District or by a board of survey appointed in accordance with any existing law or regulation."

The original petition alleges that when this suit was filed no publication had been had or action taken by the Zoning Commission looking to the putting into effect of the provisions of the Zoning Act (R., 6).

The original petition likewise alleges the fact that the application for this permit was on file at the time this petition was filed and had been on file in the office of the Building Inspector of the District of Columbia since the 26th of May, 1920.

Plaintiffs in error make no denial of these facts in their answer, so that we have them before the court as established facts.

Under this provision in the Zoning Act with these facts established, defendant in error was entitled to her permit.

Plaintiffs in error, however, take the position in their answer that this act of the Commissioners of May 24, 1920, in undertaking to adopt an amendment to the building regulations, deprived the defendant in error of her right to a building permit.

SUCH ATTEMPTED AMENDMENT TO THE BUILDING REGULATIONS IS VOID.

The Act of Congress of March 1, 1920, reads thus (Sec. 11):

> "That all laws or parts of laws and regulations in conflict with the provisions of this act are hereby repealed."

The Zoning Act, itself, is:

> "An act to regulate the height, area, and use of buildings in the District of Columbia and to create a Zoning Commission, and for other purposes."

The Zoning Commission, as created by this act, had the power to give public notice on the 2nd of March, 1920, and proceed with its hearings, as provided for under the provisions of Sec. 2 of said act.

Under the provisions of the Zoning Act the three Commissioners of the District of Columbia constitute three of the five members of the Zoning Commission as provided for in Sec. 1 of said Zoning Act.

Instead of the Zoning Commission undertaking to function as they were required to do by law, the three Commissioners of the District of Columbia—acting as Commissioners of the District of Columbia, not as Zoning Commissioners—undertook to pass a regulation to control the use to which property should be made, which was the power vested exclusively in the Zoning Commissioners under the Zoning Act.

The repealing clause of the Zoning Act repealed all laws as of the date of the act of March 1, 1920, which were in any wise inconsistent with or in conflict with the provisions of said act, and all of this in direct conflict with the provisions of the act itself (Sec. 5 thereof), which forbids even the Zoning Commission making any regulation or rule that in any wise requires "any change in the plans, construction or designated use of (a) a building for which a permit shall have been issued or plans for which shall be on file with the Inspector of Buildings of the District of Columbia at the time the orders or regulations authorized under this act are promulgated."

The record shows that the application for the permit to construct this building and the plans and specifications were "on file with the Inspector of Buildings of the District of Columbia" long before any orders or

regulations of the Zoning Commission were adopted or attempted to be adopted.

We, therefore, respectfully submit that this attempt of the District Commissioners to control the use to which a building should be put after the passage of the act of March 1, 1920, was void. If void, then the contention of the plaintiffs in error must fail, for they rely exclusively upon this regulation to defeat the defendant in error's right to a permit.

PROPOSED AMENDMENT TO THE BUILDING REGULATIONS OF MAY 24, 1920, NOT A BUILDING REGULATION.

Even though there had been no Zoning Act, this alleged amendment to the building regulations of May 24, 1920, is not a building regulation.

It does not in any wise relate to the "height, depth, material, or manner of construction of the building, itself."

This attempted action of the Commissioners was taken, as they claim in their answer, under the authority vested in them by the Act of Congress of June 14, 1878, which authorized and directed them as Commissioners of the District of Columbia to make and enforce said building regulations as they may deem advisable.

The Court of Appeals of the District of Columbia considered this identical question in MACFARLAND vs. MILLER, 18 App. D. C., 554-564.

The question before the court in this case was the validity of a regulation known as Sec. 34 of the building regulations which declared that:

> "no dwelling house less than sixteen feet wide shall be erected; provided, however, that any exist-

> ing lot that is not less than twelve feet wide, and which is a part of a duly recorded subdivision, may have a dwelling erected thereon the full width of the lot."

Mr. Chief Justice Sheppard of the Court of Appeals of the District of Columbia delivered the opinion of the court in this case. In his opinion, as found on page 563 of this volume, he said:

> "In our opinion this particular requirement cannot properly be considered a building regulation within the powers conferred by Congress to that end in the act before referred to.
>
> "It does not relate to the height, depth, material, or manner of construction of the building itself."

THE PROPOSED BUILDING REGULATION IS A CONSTITUTIONAL INFRINGEMENT OF THE CONSTITUTION OF THE UNITED STATES, 14TH AMENDMENT.

By reference to the proposed amendment to the building regulation which is pleaded by the plaintiffs in error in defense of their refusal to grant defendant in error the permit, it will be seen that one or more persons, who may own sufficient property in a square in the finest residential section of Washington, might have obtained a permit and constructed a building to be used in a manner most detrimental to the property interest in the community and most objectionable to those living in the immediate neighborhood, when one owning less property would be powerless to control the situation.

In other words, if the proposed building regulation be valid under the police powers of the city, then the

defendant in error would be deprived of the use of her property without the due process of law and be denied the equal protection of the laws.

An ordinance similar to this was considered by this court in EUBANK vs. CITY OF RICHMOND, 226 U. S., 137-145. In this court's opinion, which was delivered by Mr. Justice McKenna, in considering this question, as found on page 145 of the report, the court said:

> "We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence—even, it may be, the kind of business or character of residence. One person having a two-thirds ownership of a block may have that power against a number having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property, exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power."

It is most respectfully submitted that the motion to dismiss in this case should be granted. If, however, the Court should determine and consider the question on its merits, we most respectfully submit that the decision of the Court of Appeals of the District of Columbia should be affirmed.

Respectfully submitted.

W. GWYNN GARDINER,
Attorney for Defendant in Error.

BROWNLOW ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA, ET AL. *v.* SCHWARTZ.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 95. Argued January 16, 1923.—Decided February 19, 1923.

Before allowance of a writ of error to review a judgment directing issue of a writ of mandamus to compel the granting of a building permit, the permit was issued, the building erected and the property transferred to persons not parties to the cause. *Held*, that, irrespective of the motive for granting the permit, the cause was moot, and, for that reason, the judgment below should be reversed, with directions for dismissal of the petition for mandamus, without costs. P. 217.

50 App. D. C. 279; 270 Fed. 1019, reversed.

ERROR to a judgment of the Court of Appeals of the District of Columbia reversing a judgment of the Supreme Court of the District, which dismissed a petition for the writ of mandamus, and directing that the writ be issued.

Mr. Robert L. Williams, with whom *Mr. F. H. Stephens* was on the brief, for plaintiffs in error.

Mr. W. Gwynn Gardiner for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The defendant in error, petitioner below, on June 9, 1920, filed a petition in the Supreme Court of the District of Columbia, praying for a writ of mandamus against respondents requiring them to issue to her a permit to erect a building for business purposes on a lot situated on a residence street in Washington. Prior to filing the petition she made preparations to erect the building and applied to the Building Inspector for a permit, which he

declined to issue, upon grounds not necessary to be stated here.

The plaintiffs in error, respondents below, filed an answer to the petition and return to the rule to show cause; and to the answer a demurrer was interposed. On July 6, 1920, the demurrer was overruled, the rule to show cause discharged, and petition dismissed. Upon appeal to the Court of Appeals this judgment was, on February 7, 1921, reversed and the cause remanded with directions to issue the writ as prayed. On March 19, 1921, an application for a rehearing was overruled and on June 13th following, this writ of error was allowed.

On March 14th, after the decision of the Court of Appeals but before the allowance of the writ of error, the permit demanded by petitioner was issued by the Building Inspector, and thereupon the building was constructed. It had been fully completed when the writ of error was allowed. On June 2, 1921, petitioner conveyed all her interest in the property to persons not parties to this cause.

It thus appears that there is now no actual controversy between the parties—no issue on the merits which this Court can properly decide. The case has become moot for two reasons: (1) because the permit, the issuance of which constituted the sole relief sought by petitioner, has been issued and the building to which it related has been completed, and (2) because, the first reason aside, petitioner no longer has any interest in the building, and therefore has no basis for maintaining the action.

This Court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause

which no longer exists is a proceeding which this Court uniformly has declined to entertain. See *Mills* v. *Green*, 159 U. S. 651; *Codlin* v. *Kohlhausen*, 181 U. S. 151; *Little* v. *Bowers*, 134 U. S. 547, 556; *Singer Manufacturing Co.* v. *Wright*, 141 U. S. 696, 699; *American Book Co.* v. *Kansas*, 193 U. S. 49; *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475; *Berry* v. *Davis*, 242 U. S. 468, 470; *Board of Public Utility Commissioners* v. *Compañia General de Tabacos de Filipinas*, 249 U. S. 425; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Heitmuller* v. *Stokes*, 256 U. S. 359.

It is urged that the permit was issued by the Inspector of Buildings only because he believed it was incumbent upon him to comply with the judgment of the Court of Appeals and avoid even the appearance of disobeying it. The motive of the officer, so far as this question is concerned, is quite immaterial. We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate. *American Book Co.* v. *Kansas, supra.* The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the writ of error would leave the judgment of the Court of Appeals requiring the issuance of the mandamus in force—at least apparently so—notwithstanding the basis therefor has disappeared. Our action must, therefore, dispose of the case, not merely of the appellate proceeding which brought it here. The practice now established by this Court, under similar conditions and circumstances, is to reverse the judgment below and remand the case with directions to dismiss the bill, complaint or petition. *United States* v. *Hamburg-American Co., supra; Berry* v. *Davis, supra; Board of Public Utility Commissioners* v. *Compañia General de Tabacos de Filipinas, supra; Commercial Cable Co.* v. *Burleson, supra; Heitmuller* v. *Stokes, supra.*

Following these precedents, the judgment below should be reversed, with directions to the Court of Appeals to

remand the cause to the Supreme Court with instructions to dismiss the petition without costs, because the controversy involved has become moot and, therefore, is no longer a subject appropriate for judicial action.

And it is so ordered.